United States Court of Appeals

for the Second Circuit

APPENDIX

76-7313

In The

United States Court of Appeals

For The Second Circuit

G & S DEVELOPMENT CORPORATION, FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs-Appellants,

-against-

LINCOLN FIRST REAL ESTATE CREDIT CORPORATION and NATIONAL BANK OF WESTCHESTER,

Defendants-Appellees.

APPENDIX FOR PLAINTIFFS-APPELLANTS

WILLKIE FARR & GALLAGHER
Attorneys for Appellants
G&S Development Corp.,
Frank J. Greskovich and
Benjamin L. Stalnaker
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

McCARTHY, FINGAR, DONOVAN and GLATTHAAR
Attorneys for Defendant and Appellee
Lincoln First Real Estate
175 Main Street
White Plains, New York 10601
(914) 946-3700

UNITED STATES COURT OF APPEALS
FILED
JAN 3 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

(10292)

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PAGINATION AS IN ORIGINAL COPY

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OFFICE RECORD

1A

COPY OF DOCKET ENTRIES
(pp. 1A-3A)

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE COOPER

Jury demand date:

D. C. Form No. 106 Rev.

74 CIV. 2451

TITLE OF CASE	ATTORNEYS
G & S DEVELOPMENT CORP. FRANK J. GRESKOVICK BENJAMIN L. STALMAKER V LINCOLN FIRST REAL ESTATE CREDIT CORP. NATIONAL BANK OF WESTCHESTER	For plaintiff: WILKIE FAR & GALLAGHER 1 Chase Manhattan Plaza, N.Y. 248-1000 For defendant: McCarthy, Fingar, Donovan and Glatthaar 175 MainSt, White Plains, NY 10601

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk		6/4/74	Wilkie F	NT	
			6/11/74	UCT		NT
J.S. 6 mailed 5-28-76	Marshal					
Basis of Action: Br. of Contract $2,500,000	Docket fee					
	Witness fees					
Action arose at:	Depositions					

BEST COPY AVAILABLE

G & S DEV. CORP. V. LINCOLN FIRST REAL ESTATE CREDIT ET AL.

74 CIV. 245

DATE	PROCEEDINGS	Date Ord. Judgment
June 6-74	Filed Complaint and issued summons.	
Jun 20-74	Filed summons with Marshal's return. Served on: Lincoln First Real Estate Credit Corp. by Mr. Carmody on 6/12/74 Natl. Bank of Westchester by Mr. Keppler on 6/12/74	
Jul 3-74	Filed defts. ANSWER to complaint.	MCC,F
Jul 22-74	Filed pltfs. answers to counterclaims.	
Jul 11-74	Filed pltfs. notice for producetion of documents to defts by Aug. 19,1974.	
Jul. 11-74	Filed pltfs. demand for trial by jury.	
Jul 11-74	Filed pltfs. notice to take depostiion of deft. First Lincoln Real Estate Credit Corp. on Aug. 21,1974,and Aug. 22,1974;and will also take the deposition of deft. Natl. Bank of Westchester on Aug. 22,	
Aug.23-74	Filed stip. and order that the time of defts. to answer pltfs.notice for production of documents is ext. to Sept.19,1974 and that the exam. before trial of defts. will commence on Sept.23,1974. So ordered Weinfeld,J.	
Oct.1-74	Filed defts. reply to pltfs. notice of production of documents.	
Oct. 2-74	Filed defts. notice to produce to pltfs. by Oct. 21,1974.	
Oct. 2-74	Filed defts. notice to take deposition of pltfs. on Nov. 12,13,& 14, 1974.	
09-30-75	PRE-TRIAL CONFERENCE HELD BY Mag Goettel	
09-04-75	PRE-TRIAL CONFERENCE HELD BY Mag Goettel	
09-23-75	Filed pltfs' notice to take depositions of defts Lincoln First Real Estate Credit Corp. on 9-29-75 and the deposition of deft. National Bank of Westchester on 9-30-75	
09-30-75	PRE-TRIAL CONFERENCE HELD BY Mag Goettel	
10-03-75	Filed pltfs G & S Development Corp. et al interrog.	
10-09-75	Filed pltfs affdvt. and notice of motion for an order granting leave ret. 10-7-75 With memo. end. Pltfs motion for leave to file a supplemental complaint is denied.---Weinfeld, J. m/n	
10-08-75	Filed defts. affdvt. in opposition to the motion of the pltfs for leave to serve supplemental complaint	
10-08-75	Filed defts memorandum in opposition to motion for leave to serve supplemental complaint	
10-10-75	Filed defts affdvt. in opposition to the motion of pltfs for leave to serve a supplemental complaint.	
10-10-75	Filed pltfs Reply affdvt. in further support of the motion of pltfs	
10-10-75	Filed pltfs memorandum in support of motion for leave to serve a supplemental complaint	
11-5-75	Pre-Trial conference held by Mag Jacobs.	
10-21-75	Pre-Trial Conference held by Mag. Goettel.	
11-13-75	Filed defts. answer to interrog.	
12-16-75	Pre-Trial Conference held by Mag Goettel	
12-18-75	Filed deft. Lincoln objections to interrog.	
01-05-75	Filed Order defts motion for an order requiring the pltfs to comply is granted pltfs shall produce and permit the atty's for the defts to inspect or makes copies of all the non-privileged documents and that such production shall be had on or before the 1-6-75. -Mag. Goettel	
01-20-76	Filed plaintiffs' preliminary pretrial memorandum.	
01-20-76	Filed defendants' pre-trial memorandum.	
01-20-76	Filed consent pre-trial order. -- Weinfeld, J.	
01-12-76	Pre-Trial Conference held By Mag Goettel	
02-20-76	Mailed notice of reassignment	

Cont'd. on Page #3

, & S DEVELOPMENT CORP., et al. -v- LINCOLN FIRST REAL ESTATE CREDIT CORP., et ano.

74 Civ. 2451 Page #3 Cooper,J.

DATE	PROCEEDINGS
04-05-76	Before Cooper,J. jury trial begun.
04-06-76	Trial continued.
04-06-76	Trial continued. Motions for directed verdict by Defts. both on Pltff's. claim and on Deft's. counterclaim - Granted. Defts. to submit an appropriate judgment on notice.
05-10-76	Filed transcript of record of proceedings dated 3-30-76.
05-28-76	Filed Judgment #76,503 - That the complaint is dismissed with prejudice and that Deft. (Lincoln First Real Estate) recover on its counterclaim from G.S. Development the total sum of $323,682.18, from Frank J. Greskovich the total sum of $323,682.18 and from Benjamin L. Stalnaker the total sum of $323,682.18.....Cooper,J. Judgment Entered 6-1-76.....Clerk. Entered 6-2-76. (mailed notice)
06-04-76	Filed transcript of record of proceedings dated 4-5-76.

SUMMONS IN A CIVIL ACTION (Formerly D.C. Form No.45a Rev. (6-49))

SUMMONS (FILED JUNE 6, 1973) (pp. 4A-5A) 4A

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

JUDGE WEINFELD

CIVIL ACTION FILE NO. 73 Civ. 2451

G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiff

v.

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

WILLKIE FARR & GALLAGHER

plaintiff's attorney, whose address is

1 Chase Manhattan Plaza
New York, N. Y. 10005

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT
Clerk of Court.

D A BECKER
Deputy Clerk.

June 6, 1974
Date:

[Seal of Court]

MARSHAL'S FEES

Travel ... $ ...

Service ...

United States Marshal.

By ...

Deputy United States Marshal.

Subscribed and sworn to before me, a ... this

day of , 19

[SEAL]

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

No.

United States District Court
FOR THE
Southern DISTRICT of New York

G & S DEVELOPMENT CORP., FRANK J. GREBKOVICH and BENJAMIN L. STALMAKER

Plaintiffs,

v.

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER

Defendants.

SUMMONS IN CIVIL ACTION

Returnable not later than twenty (20) days after service.

WILKIE FARR & GALLAGHER

Attorney for Plaintiff

FFI NI—5 27 71 300,000 6368

5A

COMPLAINT (FILED JUNE 6, 1973)
(pp. 6A-18A)

6A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs,

v.

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,

Defendants.

- X

COMPLAINT

Plaintiffs, by their attorneys, Willkie Farr & Gallagher, complaining of the defendants, allege:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is founded upon 28 U.S.C. Section 1332.

2. Plaintiff G & S Development Corp. is a corporation incorporated under the laws of the State of Delaware with its principal place of business in the State of Florida.

3. Plaintiffs Frank J. Greskovich and Benjamin L. Stalnaker are each residents and citizens of the State of Florida.

4. Upon information and belief, defendant Lincoln First Real Estate Credit Corp. is a corporation incorporated under the laws of the State of New York with its principal place of business in that State.

5. Upon information and belief, defendant National Bank of Westchester is a national banking association and a corporation organized and existing under the laws of the United States with its principal place of business in the City of White Plains, State of New York.

6. The amount in controversy, exclusive of interest and costs, exceeds ten thousand dollars.

7. The acts and transactions giving rise to the within stated claims for relief were carried out principally in the Southern District of the State of New York. Defendants' principal places of business are located in the Southern District of the State of New York.

AS AND FOR A FIRST CLAIM FOR RELIEF AGAINST DEFENDANT LINCOLN

8. In November, 1973, G & S Development Corp. (hereinafter "G & S"), commenced negotiations with Lincoln First Real Estate Credit Corp. (hereinafter "Lincoln") to obtain from Lincoln a loan to be used by G & S to finance the construction of a hospital in Pensacola, Florida. These negotiations were conducted primarily by Richard H. Crowe, Jr., President of G & S ("Crowe") and R. W. Pollitt, Jr. ("Pollitt"). Upon information and belief, Pollitt is a Senior Vice President of Lincoln.

9. By letter dated December 3, 1973, Pollitt, on behalf of Lincoln, notified G & S that Lincoln had accepted the application of G & S for a construction loan in the amount of $6,000,000. A copy of that letter is annexed hereto as Exhibit "A".

10. On or about December 10, 1973, Crowe, acting on behalf of G & S, accepted and agreed to the letter described in paragraph 9 above and, pursuant to the terms of that letter, caused the sum of $?0,000 to be paid by G & S to Lincoln.

11. On December 26, 1973, a meeting was held at the offices of Lincoln. Present were Pollitt; J. Bryan Bergen ("Bergen"), upon information and belief a Vice President of Lincoln; John Muhlfield ("Muhlfield"), upon information and belief an employee of Lincoln; Crowe; and plaintiff Dr. Benjamin L. Stalnaker ("Stalnaker").

12. At that meeting Pollitt and Bergen presented Crowe and Stalnaker with three letters from Lincoln addressed to G & S:

12(a). The first such letter (the "Construction Loan Commitment") was a "commitment letter" dated December 26, 1973 whereby Lincoln offered to commit itself to loan or cause to be loaned to G & S $6,000,000 to be used to pay for the construction of a hospital in Pensacola, Florida. The Construction Loan Commitment was executed by Pollitt and Bergen in their capacities as officers of Lincoln and is annexed hereto as Exhibit "B".

12(b). The second such letter (the "Standby Commitment") was a "commitment letter" similarly dated December 26, 1973 whereby Lincoln offered to commit itself to loan or cause to be loaned to G & S $6,000,000 to be used to repay the $6,000,000 intended to be advanced to G & S pursuant to the loan described in the Construction Loan

Commitment. The Standby Commitment was executed by Pollitt and Bergen in their capacities as officers of Lincoln and is annexed hereto as Exhibit "C".

12(c). The third such letter was a letter of transmittal, similarly dated December 26, 1973 and executed by Pollitt and Bergen on behalf of Lincoln. This letter requested G & S, as the borrower identified in the Construction Loan Commitment and Standby Commitment, to review those documents and, if the offers set forth therein were found acceptable, to indicate its acceptance and pay Lincoln the sum of $160,000 (in addition to the $20,000 previously paid) as a commitment fee in respect of the Construction Loan Commitment and the Standby Commitment. This letter is annexed hereto as Exhibit "D".

13. On December 26, 1973, at the meeting described in paragraph 11 above, Crowe, acting on behalf of G & S, duly approved and agreed to the terms of the Construction Loan Commitment and the Standby Commitment and caused the sum of $160,000 to be paid to Lincoln, thereby accepting each such commitment.

14. The Construction Loan Commitment, by its terms, contained a condition subsequent: "3. Executive Loan Screening Committee Approval." Crowe requested a clarification of this condition. On or about December 26, 1973, Pollitt, on behalf of Lincoln, (a) advised Crowe and Stalnaker that the aforesaid condition had been satisfied; or (b) that the aforesaid condition had been waived.

15. Crowe and Stalnaker thereupon requested Pollitt and Bergen, acting on behalf of Lincoln, to approve an initial payment to G & S of $300,000 as a first advance of the $6,000,000 proposed to be loaned to G & S pursuant to the Construction Loan Commitment. Lincoln, acting through Pollitt and Bergen, thereupon did approve the requested $300,000 adv_ e against the loan described in the Construction Loan Commitment and directed Crowe and Stalnaker to proceed with Muhlfield to the offices of the National Bank of Westchester ("NBW"), the lending institution which would make the requested advance.

10A

16. At the offices of NBW Crowe was requested to and did execute a note on behalf of G & S in favor of NBW in the amount of $300,000, payment of which was personally guaranteed by Stalnaker and Frank J. Greskovich (acting by his attorney-in-fact, Mr. Crowe). On January 3, 1974, G & S received from NBW the sum of $300,000 representing the funds requested as a first advance under the loan described in the Construction Loan Commitment.

17. Beginning on or about January 15, 1974 and continuing through April, 1974, Pollitt, on behalf of Lincoln, indicated in a series of discussions with Crowe Lincoln's unwillingness to make the loan committed to be made in the Construction Loan Commitment.

18. On or about April 23, 1974, Pollitt, on behalf of Lincoln, repudiated the Construction Loan Commitment and upon due demand for performance did refuse and has continued wholly to refuse to perform any of the obligations

on Lincoln's part to be performed thereunder; to wit, Lincoln has failed and refused to honor the Construction Loan Commitment and to make or cause to be made the loan to G & S called for thereunder, except to the extent that Lincoln had theretofore caused the sum of $300,000 to be loaned to G & S.

19. Up to the time of such repudiation and refusal G & S had performed all of the obligations on its part to be performed under the Construction Loan Commitment and the Standby Commitment. At the time of such repudiation and refusal, G & S was ready, willing and able and duly offered to continue the due performance of the actions required of it under the Construction Loan Commitment and the Standby Commitment.

20. As a result of the foregoing, and in the absence of an adequate remedy at law because of plaintiffs' inability to secure a replacement loan for the loan committed to be made or caused to be made by the Construction Loan Commitment, plaintiffs demand that defendant Lincoln be specifically required to perform its obligations under the Construction Loan Commitment and loan or cause to be loaned to G & S the sum of $6,000,000 on the terms set forth in the Construction Loan Commitment.

AS AND FOR A SECOND CLAIM FOR RELIEF AGAINST DEFENDANT LINCOLN

21. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 19 herein with the same force and effect as though herein fully set forth.

22. By its actions, effected on its behalf by Pollitt and Bergen, Lincoln is estopped from refusing to honor the Construction Loan Commitment by raising in its behalf such conditions subsequent as are set forth in the Construction Loan Commitment.

23. As a result of the foregoing, and in the absence of an adequate remedy at law because of plaintiffs' inability to secure a replacement loan for the loan committed to be made or caused to be made by the Construction Loan Commitment, plaintiffs demand that defendant Lincoln be specifically required to perform its obligations under the Construction Loan Commitment and loan or cause to be loaned to G & S the sum of $6,000,000 on the terms set forth in the Construction Loan Commitment.

AS AND FOR A THIRD CLAIM FOR RELIEF AGAINST DEFENDANT LINCOLN

24. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 20 herein with the same force and effect as though herein fully set forth.

25. From and after January 15, 1974, at Pollitt's direction and in order to induce Lincoln to honor the Construction Loan Commitment, Crowe attempted to cause and, on March 20, 1974, did succeed in causing the First Federal Savings & Loan Association of Erie ("Erie") to issue to G & S its "standby commitment" as a replacement for the Standby Commitment. In connection therewith and in order to obtain an extension from Erie of the expiration date of its

commitment (to facilitate its review by Lincoln), G & S paid Erie the sum of $6,000 and incurred expenses of $2,000.

26. As a result of the foregoing, plaintiffs are entitled to and demand judgment against defendant Lincoln for damages incurred by plaintiffs in connection with Lincoln's failure to honor the Construction Loan Commitment and its repudiation of the Standby Commitment in the amount of $8,000.

AS AND FOR A FOURTH CLAIM FOR RELIEF AGAINST DEFENDANT LINCOLN

27. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 20 herein with the same force and effect as though herein fully set forth.

28. From and after April 23, 1974, the time of defendant Lincoln's repudiation of the Construction Loan Commitment, Crowe, acting on behalf of G & S has diligently and in good faith attempted to secure for G & S a construction loan in lieu of the loan required to be made by the Construction Loan Commitment. Crowe has been unsuccessful in all such attempts.

29. In connection with its attempts to secure such substitute financing, G & S has incurred additional expenses aggregating $5,000.

30. As a result of the foregoing, plaintiffs are entitled to and demand judgment against defendant Lincoln for damages incurred by plaintiffs in connection with Lincoln's failure to honor the Construction Loan Commitment and its repudiation of the Standby Commitment in the amount of $5,000.

AS AND FOR A FIFTH CLAIM FOR RELIEF AGAINST DEFENDANT LINCOLN

31. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 20 herein with the same force and effect as though herein fully set forth.

32. Upon information and belief, the cost of constructing the hospital in Pensacola for which the Construction Loan Commitment was obtained has increased substantially in the period subsequent to December 26, 1973.

33. The aforesaid increase in cost is a direct consequence of the substantial delay caused by Lincoln's failure to honor the Construction Loan Commitment and is a consequence which was or should have been reasonably anticipated by Lincoln to follow such failure.

34. As a result of increased construction costs directly attributable to the delay caused by Lincoln's failure to honor the Construction Loan Commitment, plaintiffs have suffered damages and may hereafter be further damaged, all in an amount which, although not now determinable with precision, exceeds $1,800,000.

AS AND FOR A SIXTH CLAIM FOR RELIEF
AGAINST DEFENDANT LINCOLN

35. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 19 herein with the same force and effect as though herein fully set forth.

36. As of the date of this action, plaintiffs have incurred substantial expenses and obligations in connection with the development and construction of the hospital which they proposed to build in Pensacola, Florida with the proceeds of the loan committed to be made or caused to be made by the Construction Loan Commitment.

37. Defendant Lincoln, by its failure to honor the Construction Loan Commitment and its repudiation of the Standby Commitment, has put in jeopardy the hospital proposed to be built by plaintiffs with the result that all or a substantial portion of plaintiffs' investment therein has been or will be lost.

38. The aforesaid damages suffered by plaintiffs are the direct result of the actions of defendant Lincoln complained of herein and were or should have been known by Lincoln to be the likely consequences of its actions.

39. As a result of the foregoing, plaintiffs are entitled to and demand judgment against Lincoln for damages incurred by plaintiffs in connection with Lincoln's failure to honor the Construction Loan Commitment and its repudiation of the Standby Commitment in the amount of $540,000 and further demand that Lincoln be required to return to plaintiff G & S the $180,000 paid Lincoln as commitment fees for the Construction Loan Commitment and the Standby Commitment.

AS AND FOR A FIRST CLAIM FOR RELIEF
AGAINST DEFENDANT NBW

40. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 19, 25, 28, 29, 32, 33, 36, 37 and 38 herein with the same force and effect as though herein fully set forth.

41. Upon information and belief, Pollitt, in addition to being a Senior Vice President of Lincoln, is also a Vice President of NBW.

42. Upon information and belief, NBW and Lincoln are under common control with one another.

43. Lincoln and NBW, through Pollitt and Bergen and certain officers of NBW, aided and abetted one another in a course of conduct designed to cause and having the effect of causing plaintiffs to believe that the Construction Loan Commitment and Standby Commitment were binding obligations as of December 26, 1973.

44. Plaintiffs, as a direct result of defendants' course of action and of the representations made to Crowe and Stalnaker on or about December 26, 1973 and thereafter to the specific effect that the loan transaction described in the Construction Loan Commitment had, but for the execution of customary documentation, been concluded, were induced to execute the note in favor of NBW described in paragraph 16 above.

45. Plaintiff G & S would not have made, nor would plaintiffs Stalnaker and Frank J. Greskovich have guaranteed, the aforesaid note but for the course of conduct engaged in, and the representations made by, the defendants.

46. By reason of the foregoing, plaintiffs are entitled to and demand judgment (i) against defendant NBW enjoining NBW from disposing of, collecting or taking any action to collect the aforesaid note or enforcing the aforesaid guarantees during the pendency of this action; (ii) against defendant NBW, jointly and severally with defendant Lincoln, in an amount in excess of $2,353,000; and (iii) against defendant NBW cancelling the aforesaid note and setting off the balance owed thereunder against the amounts claimed to be owed plaintiffs by defendants.

WHEREFORE, plaintiffs demand judgment:

1. On the first, second, third, fourth and fifth claims for relief against defendant Lincoln ordering defendant Lincoln (i) specifically to perform its obligations under the Construction Loan Commitment and to loan or cause to be loaned to plaintiff G & S the sum of $6,000,000 on the terms set forth therein; (ii) as to the third claim for relief, to pay to G & S, in addition, the sum of $8,000; (iii) as to the fourth claim for relief, to pay to G & S, in addition, the sum of $5,000; and (iv) as to the fifth claim for relief, to pay to G & S, in addition, an amount in excess of $1,800,000.

2. On the sixth claim for relief against defendant Lincoln ordering defendant Lincoln to pay to plaintiffs the sum of $540,000 and to pay to plaintiff G & S the sum of $180,000, with interest thereon from December 26, 1973, in reimbursement of commitment fees paid to Lincoln by G & S.

3. On the first claim for relief against defendant NBW (i) enjoining defendant NBW from disposing of, collecting or taking any action to collect the $300,000 note made by G & S in favor of NBW or enforcing the guarantees thereof given by plaintiffs Stalnaker and Frank J. Greskovich during the pendency of this action; (ii) ordering defendant NBW, jointly and severally with defendant Lincoln, to pay plaintiffs an amount in excess of $2,353,000; and (iii) cancelling the aforesaid note made by G & S in favor of NBW and setting off the balance owed thereunder against the amounts owed plaintiffs by defendants.

4. For such other and further relief as to this Court may seem just and proper, together with the interest, costs and disbursements of this action.

WILLKIE FARR & GALLAGHER

By _____
A Member of the Firm

Attorneys for Plaintiffs
One Chase Manhattan Plaza
New York, New York 10005

EXHIBITS ANNEXED TO FOREGOING COMPLAINT

Exhibit "A"

EXHIBIT A - LETTER DATED DECEMBER 3, 1973 FROM R.W. POLLITT, JR. TO G & S DEVELOPMENT CORP. (pp. 19A-20A)

Lincoln First Real Estate Credit Corp.

1214 MAMARONECK AVENUE, POST OFFICE BOX 121, WHITE PLAINS, N.Y. 10605 AREA CODE (914) 946-5806

R.W. POLLITT, JR.
VICE PRESIDENT

December 3, 1973

G&S Development Corp.
c/o Mr. Richard H. Crowe, Jr.
253 Broadway
New York, New York

Re: Cordova Doctors Medical Center
5150 Bayou Boulevard
Pensacola, Florida

Gentlemen:

Pursuant to our recent meeting regarding the captioned property, we are pleased to accept your application for a construction loan in the amount of $6,000,000 under the following terms and conditions:

1. The amount of the loan will be $6,000,000 subject to the receipt of a confirmatory M.A.I. appraisal satisfactory to us.

2. Construction loan rate will be 4% over National Bank of Westchester's moving prime rate, plus a 3% commitment fee.

3. Term of the construction loan will be 36 months from the date of closing which shall be within 75 days upon acceptance of this letter by you.

4. Receipt of a non-refundable fee in the amount of $20,000.

This loan will be subject to the guarantee of completion and repayment which is to be joint and several obligations of the principals. This loan is further contingent upon review of plans and specifications by our architects which shall be acceptable to them as well as to Lincoln First Real Estate Credit Corporation. The final approval of the loan is subject to our Executive Loan Screening Committee as well as the

agreement of the participating banks to participate in this loan and execution of a Participation and Service Agreement satisfactory to us.

Finally, this loan is subject to the formal written commitment letter by us pending the receipt of the following:

1. Resume of the proposed administrator.
2. A typed and audited statement of the borrowing corporation.
3. Personal financial statement of Drs. B.L. Stalnaker, E.L. Murphy, James Balcom, Frank Greskovich, Henry W. Coe, Joseph Gentile, Richard W. Lucey, Don Bryan, W.R. Rundles and Howell Martin.
4. Permit and zoning resolutions of the Planning Board.
5. Two copies of the approved plans and specifications.
6. Certified cost statement of the total project.
7. Survey
8. Satisfactory site inspection.

Of course, all documents will also be subject to the approval of our corporation and counsel.

If you are in accord with the foregoing, please sign the attached copy of this letter and return with your check in the amount of $20,000, which represents the non-refundable fee. It is understood that we have approximately 45 days to complete the arrangements of this loan for you and in the event we do not, we will refund this fee at that time. If, not withstanding anything to the contrary, we should arrange this loan and if you do not choose to accept the commitment as outlined therein, the non-refundable fee will be retained by us as liquidated damages without any deductions or offset whatsoever.

If the acceptance and non-refundable fee provided for herein are not received by December 18, 1973, we shall consider your application withdrawn without further notice.

Very truly yours,

R.W. Pollitt, Jr.
Vice President

RWP,Jr.
lhf

AGREED TO AND ACCEPTED BY

_____

Date _____

EXHIBIT B - "CONSTRUCTION LOAN COMMITMENT" LETTER DATED DECEMBER 26, 1973 FROM LINCOLN TO G & S (pp. 21A-23A)

Lincoln First Real Estate Credit Corp.

1214 MAMARONECK AVENUE, POST OFFICE BOX 121, WHITE PLAINS, N.Y. 10605 AREA CODE (914) 946-5500

R.W. POLLITT, JR.
VICE PRESIDENT

December 26, 1973

G&S Development Corp.
c/o Punia Company
19 Raritan Avenue
Highland Park, New Jersey 08904

Re: Cordova Doctors Hospital
5150 Bayou Boulevard
Pensacola, Florida

Gentlemen:

We are pleased to inform you that Lincoln First Real Estate Credit Corp. has approved your application for a construction loan on the captioned property, the terms of which are as follows:

Amount of Loan:	$6,000,000.
Interest Rate:	4% in excess of National Bank of Westchester's moving prime commercial rate, payable monthly on balances outstanding, with a floor of 11.5%.
Maturity Date:	Three years from date of closing.
Borrower:	G&S Development Corp.
Guarantee of Repayment:	To be joint and several obligations of Dr. & Mrs. F.J. Greskovich and Dr. & Mrs. B.L. Stalnaker.
Security:	This loan is to be secured by a valid first lien on the captioned parcel of land of approximately five acres and the improvements to be constructed thereon. Said improvements to be a modern four story 167 bed general care hospital containing approximately 93,200 sq.ft.

Development Corp.
c/o Punia Company
Highland Park, N.J. 08904

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Advances: To be advanced in accordance with our supervising architect's certification as to completion, less 10% holdback.

This loan has been approved, subject to the following conditions:

1. Title insurance survey and all other legal documents used in connection with this loan are to be approved by counsel for Lincoln First Real Estate Credit Corporation.

2. A confirmatory M.A.I. appraisal satisfactory to Lincoln First Real Estate Credit Corporation.

3. Executive Loan Screening Committee approval.

4. Audited financial statements of the borrowing corporation and the principals thereof.

5. Compliance with all regulations, ordinances, etc. promulgated by any governmental agency, department or subdivision, and any and all amendments thereto

6. Fire insurance with extended coverage and other hazard insurance in the amount and by companies acceptable to us.

7. Agreement by the participating banks to participate in this loan and execution of a participation and servicing agreement.

8. With the exception of attorneys' fees, all other fees and expenses incidental to this transaction shall be borne by you; you shall pay all closing costs including but not limited to mortgage tax, mortgagee's title insurance premium, recording fees and appraisal fees.

9. Compliance with all terms and conditions of the permanent loan commitment issued by Lincoln First Real Estate Credit Corporation of even date herewith.

10. Approval of the proposed administrator.

11. This commitment shall be null and void if the loan transaction is not closed on or before April 1, 1974.

12. A performance and completion bond issued by a company acceptable to us in an amount of not less than $5,000,000.

G& Development Corp.,
c/o Punia Company
Highland Park, N.J. 08904

23A

13. Final plans and specifications must be approved by our designated architects. Inspection fees of our architects are to be paid by you.

If you are in accord with the foregoing, please so indicate by signing, dating and returning the enclosed copy of this letter within ten days from the date hereof.

Very truly yours,

R.W. Pollitt, Jr.
Senior Vice President

J. Brian Bergen
Vice President

RWP,Jr./lhf

(Exhibit "C")

EXHIBIT C - "STAND BY COMMITMENT" LETTER DATED DECEMBER 26, 1973 FROM LINCOLN TO G & S (pp. 24A-26A)

Lincoln First Real Estate Credit Corp.

1214 MAMARONECK AVENUE, POST OFFICE BOX 121, WHITE PLAINS, N.Y. 10605 AREA CODE (914) 948-5405

R.W. POLLITT, JR.
VICE PRESIDENT

December 26, 1973

G&S Development Corp.
c/o Punia Company
19 Raritan Avenue
Highland Park, New Jersey 08904

Re: Cordova Doctors Hospital
5150 Bayou Boulevard
Pensacola, Florida

Gentlemen:

This is to advise you that we have arranged for the making of a permanent first mortgage loan to you in the amount of $6,000,000 for a term of ten (10) years with an interest rate of fifteen (15%) per cent per annum to be repaid in monthly instalments of principal and interest in the amount of $96,798, commencing on the first day of the second month following the closing of the loan. Said loan is to be secured by a valid first lien on property situated at 5150 Bayou Boulevard, Pensacola, Florida consisting of approximately five (5) acres of land and being improved with a modern four story 167 bed general care hospital building with full basement containing approximately 93,200 square feet referred to in the building loan commitment of even date herewith and a paved parking area to accommodate ~~400~~ 200 automobiles.

The loan commitment as contained herein is subject to the following express terms and conditions:

1. Approval of title and all documents and papers by our attorneys, McCarthy, Fingar, Gaynor & Donovan, 175 Main Street, White Plains, New York.

2. Receipt at the closing of a policy of title insurance in loan amount on the American Title Association Revised Coverage form issued by a title company approved by us, containing no exceptions other than those approved by us.

3. We are to receive and approve a currently dated survey of the parcel or parcels to be mortgaged, certified to by a registered land surveyor, showing the dimensions and total square foot area of the plot, the dimensions and location of all improvements and easements, the locations of adjoining streets and the distance to and name of the nearest intersecting streets.

4. All outstanding taxes and assessments affecting any of the security for this loan due and/or payable on the date of the closing shall be paid.

5. The loan will be evidenced by your notes in the amount of $6,000,000 which shall be modified and extended to incorporate the terms of this agreement, secured by a first mortgage lien which shall encumber the real estate, buildings and improvements located thereon, and all fixtures and articles of personal property affixed by you or to be used by you in connection with the operation of said premises, buildings and improvements. All of the guarantees, collateral and restrictive provisions in effect during the construction loan period shall continue effective during the term of the permanent loan.

6. We are to be furnished with original paid up fire insurance policies of companies acceptable to us containing the non-contributory New York Standard Mortgagee Clause in our favor. Said policies are to be for three years or more and be in amounts based on an insurable value of $9,500,000.

7. The mortgage papers will provide for payment of late charges in the amount of four (4¢) cents per dollar on all payments made fifteen (15) days or more after their due date.

8. The mortgage shall contain a provision permitting the mortgagor to prepay the loan in whole or in part at any time without payment of a prepayment fee or charge of any kind after ninety (90) days prior written notice.

9. This commitment shall be null and void if the loan transaction is not closed on or before the expiration of our construction loan, as the same may be extended. In the event our construction loan mortgage is paid in full, this commitment shall automatically terminate and have no further force and effect.

26A

10. Funds are to be advanced upon the satisfactory completion of the building in accordance with the plans and specifications submitted to Lincoln First Real Estate Credit Corporation, and receipt by us of the certificate of occupancy and fire underwriters certificate.

11. Any and all licenses, permits and consents of any governmental authority which are necessary to open the new addition for use as a hospital facility shall be received and copies thereof delivered to us prior to closing.

The fees to be paid by you in connection with this loan will be approximately $25.00, which fees will cover the additional recording fees. This, however, does not include any charge for surveys, or extraordinary charges which may be necessary, costs for which must be paid by you.

Any waiver by us of the above conditions in any instance shall not be deemed to be a waiver thereof in any other instance.

This commitment is issued in response to your application for a loan and in reliance upon the representations made in said application, and is not assignable to any other person or corporation without our consent in writing. Where terms and conditions of this commitment differ from the terms and conditions of the loan as applied for, this commitment shall prevail.

If the construction loan committed for simultaneously herewith is not closed pursuant to its terms, this commitment shall automatically terminate and have no further force and effect.

Kindly signify your acceptance of this commitment by signing the attached copy of this letter and returning it to this office.

If your signed acceptance is not received by us at our office at 1214 Mamaroneck Avenue, White Plains, New York 10605, within ten (10) days from the date hereof, the commitment shall be considered withdrawn and shall become null and void.

Very truly yours,

R.W. Pollitt, Jr.
Senior Vice President

J. Brian Bergen
Vice President

RWP,Jr.
lhf

"Exhibit D"

EXHIBIT D - LETTER OF TRANSMITTAL DATED DECEMBER 26, 1973 FROM LINCOLN TO G & S

Lincoln First Real Estate Credit Corp.

3214 MAMARONECK AVENUE, POST OFFICE BOX 121, WHITE PLAINS, N.Y. 10605 AREA CODE (914) 948-5405

R.W. POLLITT, JR.
VICE PRESIDENT

December 26, 1973

G&S Development Corp.
c/o Punia Company
19 Raritan Avenue
Highland Park, New Jersey 08904

Re: Cordova Doctors Hospital
5150 Bayou Boulevard
Pensacola, Florida

Gentlemen:

We are pleased to enclose our commitment letters to Cordova Doctors Hospital for a construction loan and permanent mortgage in the maximum amount of $6,000,000.00. We ask that you read each commitment and if you have any questions regarding them, please do not hesitate to call the undersigned.

Further, with respect to the enclosed letters of commitment, it is understood that in addition to all fees and expenses set forth in said commitment letters there is due upon your acceptance of these commitments a non-refundable fee in the sum of $180,000 ($20,000 of which we now hold). Upon acceptance of these commitments by the borrower, there shall be sent to us, together with your acceptance (signed copies of these commitments), the sum of $160,000.00.

It is expressly agreed and understood that this $180,000 fee is hereby earned and should for any reason this loan fail to close, will be retained by Lincoln First Real Estate Credit Corporation as liquidated damages.

We wish to thank you for giving us the opportunity to be of service to Cordova Doctors Hospital and if there is anything we can do for the hospital, please do not hesitate to call us.

Very truly yours,

R.W. Pollitt, Jr.
Senior Vice President

J. Brian Bergen
Vice President

RWP,Jr./lhf

Received
Served

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs,

-against-

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,

Defendants.

Index No. 74 Civ. 2451 (EW)

ANSWER TO COUNTERCLAIM

Plaintiffs G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER by their attorneys, WILLKIE FARR & GALLAGHER, for their Answer to the Counterclaim herein:

AS TO THOSE MATTERS ALLEGED AGAINST G & S DEVELOPMENT CORP.

1. Denies each and every allegation contained in Paragraph 36, except admits that plaintiffs executed a note for $300,000.

2. Denies each and every allegation contained in Paragraph 37, except admits that $50,000 of the $180,000 commitment fee was paid over by defendant Lincoln First Real Estate Credit Corp.

3. Denies each and every allegation contained in Paragraph 38, except admits receiving said demand (a copy of which is attached as Exhibit 4 to the Answering Counterclaim) for payment.

4. Denies having any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 39 of the Answer.

5. Denies each and every allegation contained in Paragraph 40 of the Answer.

AS TO THOSE MATTERS ALLEGED AGAINST FRANK J. GRESKOVICH AND BENJAMIN L. STALNAKER

6. Repeats and realleges each and every denial, admission and averment made in Paragraphs 1, 2, 3 and 4 hereof as if set forth in full herein again.

7. Admits the allegations of Paragraph 42 of the Answer.

8. Denies each and every allegation contained in Paragraph 43, except admits receiving a written notice for payment from defendants.

9. Denies each and every allegation contained in Paragraph 44 of the Answer.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO EACH ALLEGED CAUSE OF ACTION IN THE COUNTERCLAIM, PLAINTIFFS ALLEGE:

10. The Counterclaim fails to state a claim upon which relief can be granted against plaintiffs.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO EACH ALLEGED CAUSE OF ACTION IN THE COUNTERCLAIM, PLAINTIFFS ALLEGE:

11. Plaintiffs incorporate herein each and every allegation contained in Paragraphs 1 through 19, 22, 25, 28, 29, 32, 33, 34, 36, 37, 38, 39, 41, 42, 43, 44 and 45 of the Complaint with the same force and effect as though herein again set forth in full.

12. By reason of the representations with respect to the note, its purpose and effect in connection with the entire transaction, defendants and each of them are estopped from demanding repayment on the note or guarantee. 30A

FOR A THIRD, SEPARATE AND COMPLETE DEFENSE TO EACH ALLEGED CAUSE OF ACTION IN THE COUNTERCLAIM, PLAINTIFFS ALLEGE:

13. Plaintiffs repeat and reallege each and every allegation herein set forth in Paragraphs 11 and 12.

14. By reason of the above, the defendants and each of them waived their right to demand repayment on the note or guarantee.

FOR A FOURTH, SEPARATE AND COMPLETE DEFENSE TO EACH ALLEGED CAUSE OF ACTION IN THE COUNTERCLAIM, PLAINTIFFS ALLEGE:

15. Plaintiffs repeat and reallege each and every allegation as set forth in Paragraphs 11 and 12.

16. The defendants are prohibited from collecting on the note or guarantee by reason of laches.

Dated: New York, New York
July 19, 1974

Yours, etc.

WILLKIE FARR & GALLAGHER

By _____

Attorneys for Plaintiffs
G & S Development Corp., Frank J. Greskovich and Benjamin L. Stalnaker
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

TO: McCARTHY, FINGAR, DONOVAN
& GLATTHAAR
Attorneys for Defendants
175 Main Street

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

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80 EXCHANGE PL. AT BROADWAY, N.Y.C. 10004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 74 C.v 2451 31A

G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs

against

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,

Defendants

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

Bronx, N.Y.

That on July 19, *19* 74 *deponent served the annexed*
Answer to Counterclaim
on McCarthy, Fingar, Donovan & Glatthaar
attorney(s) for Defendants
in this action at 175 Main Street, White Plains, N.Y. 10601
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
9th of July, 1974

Robin J. Elliott

ROBIN J. ELLIOTT
Notary Public, State of New York
No. 52-4508680
Qualified in Suffolk County
Cert. Filed in New York County
Term Expires March 30, 1975

Domenick David Monteverdi Sr

The same signed must be printed beneath

Dominick David Monteverdi, Sr.

PRE-TRIAL ORDER

(pp. 32A-68A)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,	:	74 Civ. 2451 (EW)
Plaintiffs,	:	Calendar No.
v.	:	
LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,	:	PRE-TRIAL ORDER
Defendants.	:	

The parties to this action, G & S Development Corp. ("G&S"), Frank J. Greskovich ("Greskovich") and Benjamin L. Stalnaker ("Stalnaker"), plaintiffs, and Lincoln First Real Estate Credit Corp. ("LFRECC") and National Bank of Westchester ("NBW"), defendants, by their attorneys, having appeared before the Court at a pre-trial conference pursuant to Local Calendar Rules 6 and 13 and Rule 16, Federal Rules of Civil Procedure, and the following action was taken:

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 8 of the pre-trial order.

2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings as amended

and that none of the issues raised by the pleadings were abandoned.

3. The parties stipulated that the following facts are not in dispute in this action. Defendants LFRECC and NBW admit the following allegations of the complaint.

That the defendant LFRECC is a corporation incorporated under the laws of the State of New York with its principal place of business in that State.

That the defendant NBW is a national banking association and a corporation organized and existing under the laws of the United States with its principal place of business in the City of White Plains, State of New York.

That the acts and transactions giving rise to the within stated claims for relief were carried out principally in the Southern District of the State of New York. Defendants' principal places of business are located in the Southern District of the State of New York.

That in 1973, G&S commenced negotiations with LFRECC and that R. W. Pollitt, Jr. ("Pollitt") is a Senior Vice President of LFRECC.

That on December 3, 1973, Pollitt transmitted a letter to G&S.

That G&S caused the sum of $20,000 to be paid by G&S to LFRECC pursuant to the terms of the December 3, 1973 letter.

That on or about December 27, 1973, a meeting was held at the offices of LFRECC. Present were Pollitt; J. Brian Bergen ("Bergen"), a Vice President of LFRECC; John Muhlfeld ("Muhlfeld"), an employee of LFRECC; Crowe; and plaintiff Stalnaker.

That the letters annexed to the complaint as Exhibits B, C and D, dated December 26, 1973, were transmitted to Crowe and Stalnaker.

That G&S caused to be paid to LFRECC the remaining $160,000.00 of the $180,000.00 commitment fee.

That defendant NBW advanced $300,000.00 to G&S against a short term note of G&S which was guaranteed by plaintiffs Stalnaker and Greskovich.

That, on or about April 19, 1974, after maturity of the promissory note, NBW made demand upon G&S for repayment of its $300,000.00 promissory note and that notice of the demand was received by the individual guarantors, Greskovich and Stalnaker.

4. Contentions.

Plaintiff's Contentions

Plaintiff's contentions as to liability and damages are as follows:

a. In November, 1973, G&S commenced negotiations with LFRECC to obtain from LFRECC a loan to be used by G&S to finance the construction of a hospital in Pensacola, Florida. These negotiations were conducted primarily by Richard H. Crowe, Jr., President of G&S ("Crowe") and Pollitt, a Senior Vice President of LFRECC.

b. By letter dated December 3, 1973, Pollitt, on behalf of LFRECC, notified G&S that LFRECC had accepted the application of G&S for a construction loan in the amount of $6,000,000.

c. On or about December 10, 1973, Crowe, acting on behalf of G&S, accepted and agreed to the December 3, 1973 letter

and, pursuant to the terms of that letter, caused the sum of $20,000 to be paid by G&S to LFRECC.

d. On or about December 27, 1973, a meeting was held at the offices of LFRECC. Present were Pollitt; Bergen, a Vice President of LFRECC; Muhlfield, an employee of LFRECC; Crowe; and Stalnaker.

e. At that meeting Pollitt and Bergen presented Crowe and Stalnaker with three letters from LFRECC addressed to G&S:

(i) The first such letter (the "Construction Loan Commitment") was a "commitment letter" dated December 26, 1973 whereby LFRECC offered to commit itself to loan or cause to be loaned to G&S $6,000,000 to be used to pay off the construction of a hospital in Pensacola, Florida. The Construction Loan Commitment was executed by Pollitt and Bergen in their capacities as officers of LFRECC.

(ii) The second such letter (the "Permanent Commitment") was a "commitment letter" similarly dated December 26, 1973 whereby LFRECC offered to commit itself to loan or cause to be loaned to G&S $6,000,000 to be used to repay the $6,000,000 intended to be advanced to G&S pursuant to the loan described in the Construction Loan Commitment. The Permanent Commitment was

executed by Pollitt and Bergen in their capacities as officers of LFRECC.

(iii) The third such letter was a letter of transmittal, similarly dated December 26, 1973 and executed by Pollitt and Bergen on behalf of LFRECC. This letter requested G&S, as the borrower identified in the Construction Loan Commitment and Permanent Commitment, to review those documents and, if the offers set forth therein were found acceptable, to indicate its acceptance and pay LFRECC the sum of $160,000 (in addition to the $20,000 previously paid) as a commitment fee in respect of the Construction Loan Commitment and the Permanent Commitment.

f. On or about December 27, 1973, at the meeting described above, Crowe, acting on behalf of G&S, duly approved and agreed to the terms of the Construction Loan Commitment and the Permanent Commitment and caused the sum of $160,000 to be paid to LFRECC, thereby accepting each such commitment. This agreement for which plaintffs paid a valuable consideration constituted a binding agreement to issue the loans described in the commitment letters.

g. The Construction Loan Commitment, by its terms, spelled out conditions precedent and subsequent to the aforesaid agreements. One such condition precedent was Executive Loan

Screening Committee Approval." Crowe requested a clarification of this condition. Pollitt, on behalf of LFRECC, advised Crowe and Stalnaker that the aforesaid condition had been satisfied.

h. Depite notification to G&S that the Loan Screening Committee had approved the loan, the Cordova project was formally submitted to the Loan Screening Committee on January 15, 1974. After this meeting, G&S was advised that the Loan Screening Committee had approved the loan subject to the arranging of a firm "take-out". Pollitt was responsible for the obtaining of the take-out on behalf of G&S.

i. Beginning on or about January 15, 1974 and continuing through April, 1974, Pollitt, on behalf of LFRECC, indicated in a series of discussions with Crowe, LFRECC's unwillingness to arrange the required take-out loan or make the loans committed to be made in the Construction and Permanent Loan Commitments.

j. On or about April 23, 1974, Pollitt, on behalf of LFRECC, repudiated the Construction and Permanent Loan Commitments and upon due demand for performance did refuse and has continued wholly to refuse to perform any of the obligations on LFRECC's part to be performed thereunder; to wit, LFRECC has failed and refused to obtain the take-out financing, failed and refused to honor the Construction and Permanent Loan Commitments and to make or cause to be made the loans to G&S called for thereunder.

k. Up to the time of such repudiation and refusal G&S had performed all of the obligations on its part to be performed under the Construction and Permanent Loan Commitments. At the time of such repudiation and refusal, G&S was ready, willing and able and duly offered to continue the due performance of the actions required of it under the Construction and Permanent Loan Commitments. LFRECC's refusal to perform this condition precedent relieved plaintiffs from any duty to further perform any of the other enumerated conditions in the Letter Agreements dated December 26, 1973.

l. By its actions, effected on its behalf by Pollitt and Bergen, LFRECC is estopped from refusing to honor the Construction and Permanent Loan Commitments.

m. As a result of the foregoing, and in the absence of an adequate remedy at law because of plaintiffs' inability to secure replacement loans for the loans committed to be made or caused to be made by the Construction and Permanent Loan Commitments, plaintiffs seek specific performance of LFRECC's obligations under the Construction and Permanent Loan Commitments to loan or cause to be loaned to G&S the sum of $6,000,000 on the terms set forth in the Construction and Permanent Loan Commitments.

n. From and after January 15, 1974, at Pollitt's direction and in order to induce LFRECC to honor the Construction and Permanent Loan Commitments, Crowe attempted to cause and, on March 20, 1974, did succeed in causing the First Federal Savings & Loan Association of Erie ("Erie") to renew its standby commitment, a commitment previously turned down by plaintiffs upon receipt of the defendants' commitments. In connection therewith and in order to obtain an extension from Erie of the expiration date of its commitment (to facilitate its review by LFRECC), G&S paid Erie the sum of $6,000 and incurred expenses of $2,000.

o. As a result of the foregoing, plaintiffs are entitled to judgment against defendant LFRECC for damages incurred by plaintiffs in connection with LFRECC's failure to honor the Construction and Permanent Loan Commitments in the amount of $8,000.

p. From and after April 23, 1974, the time of defendant LFRECC's repudiation of the Construction and Permanent Loan Commitments, Crowe, acting on behalf of G&S, had diligently and in good faith attempted to secure for G&S loans in lieu of the loans required to be made by the Construction and Permanent Loan Commitments. Crowe has been unsuccessful in all such attempts.

q. In connection with its attempts to secure such substitute financing, G&S has incurred additional expenses aggregating $5,000 and plaintiffs are entitled to judgment against defendant LFRECC for damages incurred by plaintiffs in connection with LFRECC's failure to honor the Construction and Permanent Loan Commitments in the amount of $5,000.

r. Upon information and belief, the cost of constucting the hospital in Pensacola for which the Construction and Permanent Loan Commitments were obtained has increased substantially in the period subsequent to December 26, 1973.

s. The aforesaid increase in cost is a direct consequence of the substantial delay caused by LFRECC's failure to honor the Construction and Permanent Loan Commitments and is a consequence which was or should have been reasonably anticipated by LFRECC to follow such failure.

t. As a result of increased construction costs directly attributable to the delay caused by LFRECC's failure to honor the Construction and Permanent Loan Commitments, plaintiffs have suffered damages and may hereafter be further damaged, all in an amount which, the proof at trial will show, exceeds $1,800,000.

u. As of the date of this action, plaintiffs have incurred substantial expenses and obligations in connection with the development and construction of the hospital which they proposed to build in Pensacola, Florida with the proceeds of the loan committed to be made or caused to be made by the Construction Loan Commitment.

v. Defendant LFRECC, by its failure to honor the Construction Loan Commitment and its repudiation of the Permanent Commitment, has put in jeopardy the hospital proposed to be built by plaintiffs with the result that all or a substantial portion of plaintiffs' investment therein has been or will be lost.

w. The aforesaid damages suffered by plaintiffs are the direct result of the actions of defendant LFRECC complained of herein and were or should have been known by LFRECC to be the likely consequences of its actions.

x. As a result of the foregoing, plaintiffs are entitled to judgment against LFRECC for damages incurred by plaintiffs in connection with LFRECC's failure to honor the Construction Loan Commitment and its repudiation of the Permanent Commitment in the amount of $540,000.

y. Plaintiffs further demand that LFRECC be required to return to plaintiff G&S the $180,000 paid LFRECC as commitment

fees for the Construction Loan Commitment and the Permanent Commitment. Under the circumstances of this case, this fee is refundable to plaintiffs; defendant LFRECC's retention thereof would constitute an unconscionable penalty and forfeiture.

z. Upon information and belief, NBW and LFRECC are under common control with one another.

aa. LFRECC and NBW, through Pollitt and Bergen and certain officers of NBW, aided and abetted one another in a course of conduct designed to cause and having the effect of causing plaintiffs to believe that the Construction and Permanent Loan Commitments were binding obligations as of December 26, 1973.

bb. On or about December 27, 1973, Crowe and Stalnaker requested Pollitt and Bergen, acting on behalf of LFRECC, to approve an initial payment to G&S of $300,000 as a first advance of the $6,000,000 proposed to be loaned to G&S pursuant to the Construction Loan Commitment. LFRECC, acting through Pollitt and Bergen, thereupon did approve the requested $300,000 advance against the loan described in the Construction Loan Commitment and directed Crowe and Stalnaker to proceed with Muhlfield to the offices of the lending institution which would make the requested advance.

cc. At the offices of NBW Crowe was requested to and did execute a note on behalf of G&S in favor of NBW in the amount of $300,000, payment of which was personally guaranteed by Stalnaker and Frank J. Greskovich (acting by his attorney-in-fact, Mr. Crowe). On January 3, 1974, G&S received from NBW the sum of $300,000 representing the funds requested as a first advance under the loan described in the Construction Loan Commitment.

dd. Plaintiffs, as a direct result of defendants' course of action and of the representations made to Crowe and Stalnaker on or about December 26, 1973 and thereafter to the specific effect that the loan transaction described in the Construction and Permanent Loan Commitments had, but for the execution of customary documentation, been concluded, relying thereon were induced to execute the note in favor of NBW described above. This note was purchased from NBW by LFRECC on or about June 30, 1975.

ee. Plaintiff G&S would not have made, nor would plaintiffs Stalnaker and Greskovich have guaranteed, the aforesaid note but for the course of conduct engaged in, and the representations made by, the defendants.

ff. By reasons of the foregoing, plaintiffs are entitled to judgment (i) against defendant NBW, jointly and sever-

ally with defendant LFRECC, in an amount in excess of $2,353,000 for the breach of the binding commitment agreements; and (ii) against defendant LFRECC cancelling the aforesaid note and setting off the balance owed thereunder against the amounts claimed to be owed plaintiffs by defendants since plaintiffs are relieved from their duty to repay the notes as an element of consequential damages.

Defendants' Contentions

The Defendants' contentions as to liability and damages are as follows:

a. Defendants contend that LFRECC's conditional acceptance of plaintiffs' application for a construction loan as set forth in Exhibit A to the complaint herein, was by its terms conditioned upon: receipt of a confirmatory M.A.I. appraisal satisfactory to Defendant LFRECC; receipt of a non-refundable fee of $20,000 (increased later to $180,000); subject to the guarantee of completion and repayment, jointly and severally by the plaintiffs, Greskovich and Stalnaker; contingent upon approval of plans and specifications by LFRECC's architects and by LFRECC; final approval of the loan by the Executive Loan Screening Committee as well as the agreement of the participating banks to participate in this loan; execution of a participation and service agreement satisfactory to LFRECC. The acceptance was sub-

ject also to a formal written commitment letter and the terms thereof and subject to the approval of LFRECC and its counsel.

b. Defendants further contend that a second letter, dated December 26, 1973, informing plaintiffs of the conditional approval of their application was conditioned by requiring a guarantee of repayment by plaintiff Greskovich and his wife and by plaintiff Stalnaker and his wife and by the execution of a valid first mortgage on five (5) acres of real property upon which the improvements were to be constructed. The letter of December 26, 1973 also specifically stated:

> "This loan has been approved, subject to the following conditions:
>
> 1. Title insurance survey and all other legal documents used in connection with this loan are to be approved by counsel for Lincoln First Real Estate Credit Corporation.
>
> 2. A confirmatory MAI appraisal satisfactory to Lincoln First Real Estate Credit Corporation.
>
> 3. Executive Loan Screening Committee approval.
>
> 4. Audited financial statements of the borrowing corporation and the principals thereof.
>
> 5. Compliance with all regulations, ordinances, etc. promulgated by any governmental agency, department or subdivision, and any and all amendments thereto.
>
> 6. Fire insurance with extended coverage and other hazard insurance in the amount and by companies acceptable to us.
>
> 7. Agreement by the participating banks to participate in this loan and execution of a participation and servicing agreement.

8. With the exception of attorneys' fees, all other fees and expenses incidental to this transaction shall be borne by you; you shall pay all closing costs including but not limited to mortgage tax, mortgagee's title insurance premium, recording fees and appraisal fees.

9. Compliance with all terms and conditions of the permanent loan commitment issued by Lincoln First Real Estate Credit Corporation of even date herewith.

10. Approval of the proposed administrator.

11. This commitment shall be null and void if the loan transaction is not closed on or before April 1, 1974.

12. A performance and completion bond issued by a company acceptable to us in an amount of not less than $5,000,000.

13. Final plans and specifications must be approved by our designated architects. Inspection fees of our architects are to be paid by you."

c. Defendants further contend that a letter was written on December 26, 1973 to plaintiff, G&S Development Corp., with respect to a standby mortgage commitment in the amount of $6,000,000 for a term of ten (10) years. The proposal for the permanent loan was subject by its terms to the following conditions:

"1. Approval of title and all documents and papers by our attorneys, McCarthy, Fingar, Gaynor & Donovan, 175 Main Street, White Plains, New York.

2. Receipt at the closing of a policy of title insurance in loan amount on the American Title Associaton Revised Coverage form issued by a title company approved by us, containing no exceptions other than those approved by us.

3. We are to receive and approve a currently dated survey of the parcel or parcels to be mortgaged, certified to by a registered land surveyor, showing the dimensions and total square foot area of the plot, the dimensions and location of all improvements and easements, the locations of adjoining streets and the distance to and name of the nearest intersecting streets.

4. All outstanding taxes and assessments affecting any of the security for this loan due and/or payable on the date of the closing shall be paid.

5. The loan will be evidenced by your notes in the amount of $6,000,000 which shall be modified and extended to incorporate the terms of this agreement, secured by a first mortgage lien which shall encumber the real estate, buildings and improvements located thereon, and all fixtures and articles of personal property affixed by you or to be used by you in connection with the operation of said premises, buildings and improvements. All of the guarantees, collateral and restrictive provisions in effect during the construction loan period shall continue effective during the term of the permanent loan.

6. We are to be furnished with original paid up fire insurance policies of companies acceptable to us containing the non-contributory New York Standard Mortgagee Clause in our favor. Said policies are to be for three years or more and be in amounts based on an insurable value of $9,500,000.

7. The mortgage papers will provide for payment of late charges in the amount of four (4¢) cents per dollar on all payments made fifteen (15) days or more after their due date.

8. The mortgage shall contain a provision permitting the mortgagor to prepay the loan in whole or in part at any time without payment of a prepayment fee or charge of any kind after ninety (90) days prior written notice.

9. This commitment shall be null and void if the loan transaction is not closed on or before the expiration of our construction loan, as the same may be

extended. In the event our construction loan mortgage is paid in full, this commitment shall automatically terminate and have no further force and effect.

10. Funds are to be advanced upon the satisfactory completion of the building in accordance with the plans and specifications submitted to Lincoln First Real Estate Credit Corporation, and receipt by us of the certificate of occupancy and fire underwriters certificate.

11. Any and all licenses, permits and consents of any governmental authority which are necessary to open the new addition for use as a hospital facility shall be received and copies thereof delivered to us prior to closing."

d. Defendants contend that this conditional standby commitment was to be utilized by plaintiffs in negotiating with other lending institutions for a permanent, first mortgage take-out on the land and improvements to be constructed with the monies furnished by the construction loan. The conditional agreement for the standby permanent loan was also conditioned upon the closing of the construction loan described in the first letter of December 26, 1973.

e. Defendants also contend that by another letter of December 26, 1973, plaintiffs were required to pay "in addition to all fees and expenses set forth in said commitment letters ... a non-refundable fee in the sum of $180,000 ($20,000 of which we now hold) ... it is expressly agreed and understood that this $180,000 fee is hereby earned and should for any reason this loan

fail to close, will be retained by Lincoln First Real Estate Credit Corporation as liquidated damages".

f. Defendants contend that the Loan Screening Committee of LFRECC met on January 15, 1974 and did not approve the construction loan referred to in the first letter of December 26, 1973.

g. Defendants contend that an officer of LFRECC notified plaintiffs that the Loan Screening Committee had not approved the construction loan and would approve the construction loan only upon the condition that the construction loan be subject to a firm, separate take-out agreement for permanent mortgage to be made to plaintiffs by another financially responsible lending institution approved by and satisfactory to LFRECC.

h. It is defendants' contention that plaintiffs never provided any evidence of an acceptable, firm, separate take-out agreement by another financially responsible lending institution as they were required to do by the Loan Screening Committee.

i. It is defendants' contention that the construction loan did not close by April 1, 1974 and the acceptance of LFRECC terminated automatically at that time.

j. Defendants contend that there was a condition to the permanent loan, i.e., that the construction loan had to close. The construction loan did not close because plaintiffs had not fulfilled the necessary requirements and therefore the permanent loan automatically terminated.

k. Defendants further contend that the $180,000 fee paid by G&S was a non-refundable fee and represented a reasonable pre-estimation by the parties of the damages that were to accrue to LFRECC if the construction loan failed to close for any reason.

l. With respect to counterclaims, defendant LFRECC states that plaintiff G&S executed a promissory note on December 31, 1973 in the amount of $300,000 payable to NBW.

m. Defendant LFRECC contends that this note is now in default and went into default on March 1, 1974 and that no payment has been received by defendants on this note from any source.

n. Defendant LFRECC contends that it purchased the note from defendant NBW for $262,258.69 on June 20, 1974.

o. Defendant LFRECC further contends that the amount due and owing on this note from G&S, as of July 31, 1975, including interest and late charges, was $301,269.09.

p. Defendant LFRECC contends that each of the individual plaintiffs, Greskovich and Stalnaker, subscribed his own written, individual guarantee of the note executed by G&S Development Corp. to NBW dated December 31, 1973.

q. Defendant contends that NBW made proper demand upon G&S and the guarantors on April 19, 1974.

r. Defendant contends that no payment has been received from either guarantors and that the guarantors are individually, jointly and severally liable to LFRECC in the amount of $301,269.09, as of July 31, 1975, with interest and late charges.

5. The parties agreed that the following documents which were marked for identification are authentic and may be received in evidence except for plaintiff's documents on damages (P 34-7 which will be inspected thereafter) (each party reserves the right to object to the admissibility of each document on any ground other than authenticity and further reserves the right to offer rebuttal exhibits). Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the exhibit was

not theretofore identified. No exhibit may be offered at trial unless identified in a pre-trial memorandum.

Plaintiffs' examination of LFRECC by Royal W. Pollitt on October 17, 1974:

Plaintiff's Exhibits

1 Memorandum from Robert Gebhardt dated August 13, 1973 and six attached pages of purported board minutes of LFRECC.

2 Memorandum from Mr. Waite to Mr. Matuszak dated July 27, 1973 with purported operating policies of LFRECC as revised July 26, 1973.

3 Memorandum from Stephen Waite to directors of LFRECC purported March 1, 1973 minutes of the Board of Directors of LFRECC attached memo dated March 18, 1974.

Continued examination of Royal W. Pollitt on May 21, 1975:

4 Memorandum from Administration Dept. of LFRECC dated July 1, 1974 to Mr. Corcoran et al.

5 Letter agreement from LFRECC to Mr. Silverman dated November 15, 1973.

6 Letter from Mr. Silverman to LFRECC dated September 20, 1973.

7 Letter from Mr. Punia to LFRECC dated November 28, 1973, with enclosure.

7-A Letter dated November 28, 1973 from G&S to LFRECC.

7-B Application for mortgage prepared by Punia Co.

8 A letter dated December 3, 1973 from LFRECC to G&S.

9 Three xerox phongrams.

Plaintiff's examination of NBW by John J. Battista, Jr. on May 21, 1975:

10 Memorandum from Mr. Battista to files dated December 28, 1973.

11 Letter agreement from LFRECC to G&S for construction loan dated December 26, 1973.

12 Letter agreement from LFRECC to G&S for permanent first mortgage dated December 26, 1974.

13 Memorandum to file from Mr. Kuhn dated January 18, 1974.

14 Memorandum to file from Mr. Battista dated February 6, 1974.

15 Memorandum to file from Mr. Battista dated February 27, 1974.

16 A letter from NBW to G&S dated April 19, 1974.

Plaintiff's examination of LFRECC by Royal W. Pollitt on May 21 and 22, 1975:

17 Memorandum from Mr. Bergen to Mr. Pollitt dated December 28, 1973.

18 Memorandum from Mr. Kuhn to file dated December 28, 1973.

18-A Memorandum with a checkmark.

19 The loan screening committee's mortgage submission package.

20 The loan screening committee's minutes of January 15, 1974.

21 Letter from Mr. Crowe to LFRECC dated January 31, 1974.

22 Letter dated January 3, 1974. (Erie commitment)

23 Letter from Mattson and Streetman to LFRECC dated January 11, 1974.

24 Memorandum dated January 22, 1974 from Mr. Pollitt to file.

25 A letter dated January 18, 1974 to LFRECC from Mr. Crowe.

26 An undated single page of xerox notes.

27 Letter from Mr. Glatthaar to Mr. Crowe dated March 6, 1974.

28 Letter from Mr. Punia to LFRECC dated June 26, 1974.

29 Letter dated April 24, 1974 from Mr. Crowe to LFRECC.

30 Letter from Mr. Silverman to Mr. Coin dated March 7, 1974; Letter from Mr. Silverman to Mr. Blount dated March 13, 1974; Letter from Mr. Easton to Mr. Silverman dated April 12, 1974.

31 Memorandum to Mr. Kuhn from Mr. Pollitt dated January 22, 1974.

32 Memorandum dated February 26, 1974 from Mr. Pollitt to Mr. Kuhn.

33 Memorandum from Mr. Kuhn to Mr. Corcoran dated May 29, 1974.

Plaintiff's examination of LFRECC by James Corcoran on September 25, 1975:

34 Letter from LFRECC and Mr. Bergen to G&S dated December 26, 1973.

35 Memorandum to Mr. Carmody from Mr. Pollitt dated March 6, 1974.

36 Letter from LFRECC to Mr. Crowe dated April 9, 1974.

Plaintiff's examination of NBW by John Kuhn on September 25, 1975:

37 Memorandum from Mr. Kuhn to files dated February 25, 1974.

38 Letter from Mr. Crowe to LFRECC dated March 1, 1974.

39 Letter from Mr. Crowe to LFRECC dated March 1, 1974.

Plaintiff's Documents on Damages

1 Letter agreement of Laventhol & Horwath tc G&S dated November 20, 1974 setting forth terms of agreed preliminary feasibility study -- total $6,000 estimated fees.

2 Check No. 116 dated November 24, 1974 in the amount of $1,000 to Laventhol and Horwath as payee -- new hospital study.

3 Letter of Laventhol & Horwath to G&S dated December 9, 1974, showing payment of retainer of $1,000 and claiming an additional $1,000 for total retainer of $2,000.

4 Letter of R. Crowe to S.F. Leonard of Laventhol dated February 6, 1975, showing payment of $1,000.

5 Invoice of Laventhol & Horwath dated May 22, 1975, showing payment of $1,500; balance of $2,897 due on the total billing of $4,397 fees and expenses.

6 Letter of Laventhol & Horwath to G&S dated September 25, 1975, showing balance of $6,123.00 due.

7 Check No. 104 - Robert Sylvor re: Cordova Center, Inc.'s incorporation fee $1,048.00.

8 Check No. 102 - Liddy, Sullivan et al re: 9 months (April - December 1973) retainer and out-of-pocket reimbursement $4,707.69.

9 Check No. 117 - Liddy, Sullivan et al re: out-of-pocket disbursements 6-8-74 to 12-31-74 $1,435.80.

10 Check No. 108 - Liddy, Sullivan et al re payment for five months retainer fee at $500 per or $2,500.00.

11 Check No. 111 - Liddy, Sullivan re: out-of-pocket disbursements from 1-1-74 to 6-7-74 $1,817.94.

12 Check No. 103 - G&S to BAAR'S REALTY as payee in the amount of $51,727.06 for release of mortgage on land.

13 Invoice of R. Crowe to G&S dated 12-31-75 for professional services and disbursements from 4-1-73 to 12-31-75, showing $135,477.00 due.

14 Invoice of D.H. Link, CPA, dated 1-22-74 showing fee for professional services rendered -- $250.00 due.

15 A letter from R.H. Little to Crowe dated February 10, 1974 showing R.H. Little relation with G&S as project coordinator as of December 27, 1973.

16 Invoice of R.H. Little dated May 27, 1974 showing total obligation incurred for services as $12,261.67 and payment of $5,000 on account on June 7, 1974.

17 Check No. 110 in the amount of $5,000 to R.H. Little as payee.

18 Check No. 113 in the amount of $3,000 to R.H. Little as payee.

19 Invoice of R.H. Little dated October 2, 1974 showing payment of $3,000 on account with total balance due as $4,706.45.

20 Letter of H. Reeves, Esq., to R. Crowe dated June 16, 1975, showing $5,029.31 unpaid and due to R.H. Little and Associates.

21 Contract between Joe M. Rodgers and Associates Inc. dated May 25, 1973.

22 Invoice No. 1958 from Joe Rodgers to G&S dated August 3, 1973, Progress Billing No. 1 showing balance due $23,608.28.

23 Check No. 159 dated August 10, 1973 payable to Joe Rodgers re hospital construction for $23,608.28.

24 Invoice Nos. 1985 and 2036 and Progress Billing Nos. 2 and 3.

25 Invoice No. 2197 and Progress Billing No. 6 dated December 28, 1973 from J.M. Rodgers showing an amount due of $35,777.82.

26 Invoice No. 2198 from J. Rodgers to G&S re interest accrued in the amount of $870.86.

27 Check No. 1 dated December 31, 1973 payable to Joe M. Rodgers from G&S for $36,648.68.

28 Invoice Nos. 22.2, 2300, 2350, and Project Billing Nos. 7, 8 and 9.

29 Invoice No. 2359 dated April 1, 1974 Interest accrued in the amount of $238.05.

30 Letter from J.M. Rodgers to Crone dated April 11, 1974 re: balance outstanding of $21,387.30.

31 Invoice No. 2446 and Progress Billing No. 10 showing balance outstanding of $25,090.76.

32 Check No. 109 - Joe Rodgers re: hospital construction $10,000.

33 Letter from J.M. Rodgers dated June 27, 1974 acknowledging payment of $10,000 and showing balance outstanding of $19,771.97.

34 Check No. 112 - Homestead Savings & Loan re: Inspection of Hospital location $1,940.00.

35 Check No. 115 - Erie Savings & Loan Association re: construction stand-by agreement $6,000.00.

36 Application for Mortgage Loan Commitment to Hibbard O'Connor & Weeks, Inc. dated March 4, 1974 acknowledging $11,000 deposit.

37 Check No. 108 - G&S to Mellon National Mortgage Co. as payee dated 5-1-74 in the amount of $20,000.00 escrowed.

38 U.S. Partnership Tax Return Form 1065-1973 for Cordova Doctors Hospital Assoc. showing business expenses totalling $32,700.00.

39 Letter dated August 23, 1973 from Allen H. Feinburg to Crowe re: $300,000 fee agreement.

40 Claim of lien by Allen H. Feinburg dated November 27, 1973 in the amount of $300,000.

41 Claim of lien by Alvin D. Davis dated September 4, 1973 in the amount of $15,000.

42 Invoice from J.M. Rodgers concerning amount due of $2,402.00 for Bell Steel Co. Engineering work.

43 Statement dated May 30, 1973 from Ted Neckles showing payment of $15,000 on total invoice of $31,600.00 with balance of $16,600.00 due.

44 Checks No.s 111, 112, 113, 145 payable to Ted Neckles totalling $36,500.

45 Check No. 114 - Peter Griffin re: negotiations with Hyatt Hospitals $500.00.

46 Check No. 115 - Frank J. Greskovich re: travel reimbursement $2,000.00.

47 Invoice No. 57 from H. Boutwell for clearing hospital site - $2,500 indicating amount paid.

48 Check No. 399 - dated 11-20-73 to LFRECC as payee; $20,000.00 application fee.

49 Letters of W.L. Twiste of Trainer, Wortham & Co. dated 1-12-74 verifying transfer of commitment fee of $160,000 to LFRECC on 1-28-73.

50 Check No. 101 - Lincoln First Real Estate Credit Corporation re: travel expenses $1,000.00.

51 Letter of R.T. Smoot of First Federal to G.M. Mattson of Hibbard, O'Connor & Weeks dated 4-5-74, showing $6,000.00 non-refundable extension fee for stand-by commitment due; letter notation that fee wired 4-9-74 at 12:00 p.m.

52 Letter of R. Crowe to R.T. Smoot dated 11-20-74 with attached receipt for certified mail dated 11-22-74, showing that extension fee of $6,000.00 was wired on 4-9-74 to First Federal account No. 100-647-4.

Proposed Exhibits by Defendants:

1 Promissory note of December 31, 1973 executed by G&S.

2 Guaranty of Stalnaker dated December 31, 1973.

3 Guaranty of Greskovich dated December 31, 1973.

4 Copy of letter of demand for payment sent to G&S dated April 19, 1974, with return receipt card, indicating copies sent to Greskovich and Stalnaker.

5 Letter of January 3, 1974 from First Federal of Erie (commitment).

6 Letter of January 11, 1974 from Hibbard, O'Connor & Weeks to LFRECC.

7 Letter of January 15, 1974 from Capitol Development Corp. to LFRECC.

8 Pollitt memo to file of January 22, 1974 regarding phone call to Messrs. Kephart and Streetman.

9 Copy of Crowe letter of January 24, 1974 to Mr. Smoot of Erie.

10 Copy of letter of January 30, 1974 from Mr. Smoot of Erie to Crowe.

11 Memorandum of John Muhlfeld to Pollitt of January 31, 1974.

12 Memorandum of John W. Kuhn of NBW to file of February 25, 1974.

13 Copy of Punia Company's letter of submission of February 25, 1974 to Home Federal Saving's & Loan of Hollywood, Florida.

14 Copy of Punia Company letter of February 28, 1974 to Columbia Savings and Loan, Fair Lawn, New Jersey.

15 Copy of March 20, 1974 commitment of Erie to Hibbard, O'Connor & Weeks.

16 Letter of April 4, 1974 from Crowe to LFRECC.

17 Letter of LFRECC to Crowe dated April 9, 1974.

18 Pollitt file memo of May 2, 1974.

19 Letter of May 30, 1974 LFRECC to Joseph B. Glatthaar.

20 Copies of letters from Ivor B. Clarke Co. Inc. received by LFRECC from Crowe dated May 30, 1974 and June 3, 1974.

21 Letter of March 6, 1974 Glatthaar to Crowe.

22 Letter of January 18, 1974 Crowe to Pollitt.

23 NBW loan file on G&S's $300,000.00 commercial loan and guarantees.

24 Corporate resolution of G&S authorizing the $300,000.00 loan.

25 Power of attorney dated January 6, 1972 executed by Mr. Greskovich to Crowe.

26 Affidavit of Richard H. Crowe that the power of attorney is still in force and effect.

27 Letter of Punia to LFRECC dated June 26, 1974.

28 Memorandum of Muhlfeld to file dated July 8, 1974.

29 Pollitt memorandum to file of June 17, 1974.

30 Undated copy of LFRECC's letter of submission of construction loan to Loan Screening Committee.

31 Pollitt memo to Palermo of May 21, 1974.

32 Affidavit of Patricia Simons sworn to June 21, 1974.

33 Documents evidencing purchase of $300,000.00 note from NBW by LFRECC and the transfer of it and guarantees by NBW to LFRECC.

34 Typed comments of John Munro dated January 5, 1974 regarding the Cordova Doctors Submission.

35 Letter with enclosures of Pollitt to Munro dated January 4, 1974.

36 Defendants reserve right to offer any exhibit marked at the examination before trial of Pollitt, John J. Battista, John W. Kuhn, James C. Corcoran, Alan Lindley

and John Munro as well as any of the plaintiffs' proposed exhibits as set forth herein and all documents furnished to plaintiffs under their Notice to Produce. Defendants further reserve the right to offer as exhibits any documents furnished by plaintiffs pursuant to the defendants' Notice to Produce of October 10, 1974.

37 Memorandum Frech to Pollitt dated July 22, 1975.

6. Witnesses.

The parties agree that the witnesses whom each party now intends to call are those listed below. Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to the other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the Deputy Clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the witness was not theretofore identified. No witness may be called at the trial unless identified in a pre-trial memorandum or a supplemental pre-trial memorandum.

1. Richard Crowe
2. Frank J. Greskovich
3. Benjamin L. Stalnaker
4. Royal W. Pollitt, Jr.
5. J. Brian Bergen
6. John J. Battista
7. John W. Kuhn
8. Joe Rogers
9. Glen Pillow
10. Dennis Mellon
11. Joel Mesznick
12. Jack Silverman
13. Saul Punia
14. John Muhlfeld
15. James Corcoran

The defendants reserve the right to call one or more of the following witnesses:

1. Royal W. Pollitt, Jr.
2. James Corcoran
3. Richard Crowe
4. Frank J. Greskovich
5. Benjamin L. Stalnaker
6. John J. Battista
7. John W. Kuhn
8. Alan Lindley
9. John Muhlfeld
10. J. Brian Bergen
11. Harvey B. Hoffman
12. Rocco Palermo
13. Solomon Punia
14. Jack Silverman
15. Floyd Kephart
16. Kenneth Streetman
17. Ralph Smoot
18. Gary Mattson
19. George C. Byrnes
20. John Munro
21. Walter Nelson
22. William Carmody
23. Barry Geller
24. Richard R. Pergolis

7. The parties agree to limit the number of expert witnesses as follows: None.

8. The parties agreed that the following are all of the claims for damages or for other relief in this action as of the date of this conference:

Plaintiffs' Claims for Damages Against LFRECC

I. DAMAGES CLAIMED IF PROJECT ABANDONED

1. Feasibility Study, Architects' Fees, Engineering Studies

Consultant's Fee and Feasibility Study (Theodore Neckles)	400,000.00
Architects' Fee (Feinburg Lien)	300,000.00
Engineering Study - Mechanical Systems Design (Davis Lien)	15,000.00
Engineering and Drafting (Bell Steel Co.)	2,402.00

2. Land Costs

Cost of Land	87,500.00
Taxes paid on site as of May 23, 1974	2,000.00
MAI Appraisal (Earl B. Miller)	3,500.00

3. Site and Construction Costs

JM Rogers & Associates - Construction	98,920.88
Site Clearing (Boutwell)	2,500.00
Pensacola Surveying	3,000.00

4. Employees and Miscellaneous Business Expenses

Development Director's salary (R.H. Little)	6,000.00
Lien for Wages for Project Manager (John Hoffer)	15,000.00
Air Fare	14,000.00
Telephone	8,000.00
Meals	5,500.00
Cars	4,500.00
Hotels	7,000.00
Postage, paper, photocopies, photographs, secretarial and messenger services	10,000.00

5. Legal and Accountants Fees

Link	500.00
Richard Crowe - legal expenses for LFRECC loan; alternative financing and other legal expenses	137,477.00

Cost of Incorporation (Robert Sylvor)	1,048.00

6. Interest Costs

Interest on monies utilized for project - Citizens and People's National Bank	30,000.00

7. Expenses and Fees Incurred in Obtaining Financing

a) Prior to December 27, 1973

James Connecll - 5 applications with fees	25,000.00
Capital Development Corp. of Nashville, Tenn. Mortgage broker fees (American Financial Leasing & Services Co.)	14,000.00

b) Expenses Incurred Obtaining LFRECC Loan*

Application Fee	20,000.00
Commitment Fee	160,000.00
Inspection Fee	1,000.00

c) Efforts to Obtain Loan Acceptable to LFRECC (Take-out)*

First Federal Savings & Loan Association of rie, Pa. - Fee to extend commitment	6,000.00
Hibbard O'Connor & Weeks of Houston Texas - Mortgage Broker's fee	11,000.00

d) Efforts to Obtain Alernative Bank Financing to LFRECC Loan*

Home State Savings Association Site Inspection Fee	1,940.00
R.H. Little Association Nashville, Tenn.	6,000.00

e) Efforts to Finance Through Bonds

Peter Griffin re: management by Hyatt Medical Enterprises as condition of bond financing	500.00
Laventhol Study	11,000.00

- - -

Alternatively

- - -

II. DAMAGES CLAIMED IF PROJECT COMPLETED WITH REPLACEMENT FINANCING

All marked asterisks indicate items of damage which would be compensable under this alternative claim.	----------
Future increased construction costs expected to be incurred as a result of delay in financing.	2,100,000.00
Increased interest rate on replacement loan.	----------
Brokers fees to obtain replacement financing.	----------

- - -

Alternatively

- - -

III. EQUITABLE RELIEF SOUGHT BY PLAINTIFFS

Specific Performance of Construction Loan Commitment by plaintiffs.	6,000,000.00

- - -

IV. RELIANCE DAMAGES

Cancellation of Indebtedness Incurred on $300,000 note issued by NBW and held by LFRECC with interest and penalties.	$301.269.09 (as of July 1, 1975)

Defendants' Claim for Damages

Repayment on Promissory Note with interest	301,269.09
Judgment in the same amount on the guarantees executed by Greskovich and Stalnaker	301,269.09

9. The parties also agreed on the following matters:

Plaintiff at this time expects to require 3 trial days.

Defendants at this time expect to require 3 trial days.

10. The issues to be tried are formulated by the Court (with the consent and agreement of the parties) as follows:

Plaintiffs' Complaint Issues

(1) Does plaintiffs' complaint state claims upon which relief can be granted against defendants?

(2) Were all conditions precedent to the letters of December 26, 1973 fulfilled?

(a) Are defendants estopped from denying that the condition of Loan Screening Committee approval was waived and/or fulfilled?

(b) Was take-out financing a condition precedent?

(3) Were plaintiffs relieved from any further duty of performance of the conditions of the Letter Agreements dated December 26, 1973 by reason of the actions of LFRECC?

(4) Is the commitment fee paid by plaintiffs non-refundable under the facts and circumstances of this case?

(5) Are plaintiffs relieved from their obligation to repay the promissory notes as an element of consequential damages?

(6) What are plaintiffs' damages.

Defendants' Counterclaim Issues

(1) Are plaintiffs relieved from their obligation to repay the promissory notes by reason of the actions of LFRECC and NBW?

(2) If not, what amount and what interest is due and payable on the promissory notes?

(3) Are Stalnaker and Greskovich liable as guarantors on the obligation owing to LFRECC on the promissory notes.

Dated: New York, New York
January 12, 1976

ENTER

/s/ Magistrate Gerard Goettel
U.S.D.J.

CONSENTED TO:

Willkie Farr & Gallagher
Attorneys for Plaintiffs

McCarthy, Fingar, Donovan & Glatthaar
Attorneys for Defendants

PLAINTIFFS' TRIAL MEMORANDUM
(pp. 69A-93A)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G&S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,	:	
Plaintiffs,	:	Index No. 74 Civ. 2451
-against-	:	(IBC)
LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,	:	
Defendants.	:	

TRIAL MEMORANDUM OF PLAINTIFFS G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH AND BENJAMIN L. STALNAKER

PRELIMINARY STATEMENT

Plaintiffs, G & S Development Corp. ("G&S"), Frank J. Greskovich ("Greskovich") and Benjamin L. Stalnaker ("Stalnaker") submit this trial memorandum to acquaint the court with the facts of law applicable to this litigation.

FACTS

Early in 1972 Stalnaker and Greskovich began investigating the fesasibility of constructing a general diagnostic and treatment hospital to serve the Pensacola,

Florida community. The proposed Cordova Doctors Hospital would be located on a five acre site in Pensacola previously purchased by Stalnaker and Greskovich and would provide its attending physicians and their patients with the latest in therapeutic, diagnostic and nursing care. The hospital concept was discussed with numerous physicians in the Pensacola area and ultimately 12 prominent physicians with various specialties agreed to participate in a partnership to develop the hospital plan.

As a first step to obtaining financing, plans, surveys and studies were prepared for presentation to lenders. Surveys were taken of the site and filed with the State of Florida. Allen Feinberg was engaged as the architect for the project and his plans were submitted for review to the State of Florida. Feinberg's plans called for the construction of a multi-story building with 5 operating rooms, an emergency room, intensive care unit, maternity ward and a total of 150 medical and surgical beds. Plaintiffs also commissioned various experts to study the Cordova proposal and prepare various feasibility reports on the project. It was also necessary to obtain an appraisal of the property with a projection of the value of the hospital when completed. When these plans and studies were completed, plaintiffs executed an contract with Joe M. Rogers and Associates,

a contractor with considerable experience in hospital construction. Arrangements were also made with various contractors for the site clearance and R. H. Little & Co. was hired as project coordinator. In order to operate as a corporate entity seeking financing, G&S was formed on June 27, 1973 as a Delaware corporation authorized to do business in Florida.

By the summer of 1973, the plans had been finalized to a point where efforts were made to secure construction and permanent financing of the hospital project. Richard H. Crowe, Esq. ("Crowe"), an attorney for G&S, was principally responsible for financing arrangements and began contacting numerous brokers and lending institutions on behalf of plaintiffs. One of the contacts made by Crowe was defendant Lincoln First Real Estate Credit Corp. ("LFRECC"). By letter dated September 20, 1973, Punia Company, a broker for the plaintiffs, sent a Mortgage Application and exhibits for the Cordova project to John Muhlfeld ("Muhlfeld") requesting LFRECC to review the application and to advise as to LFRECC's interest in the project.

After several letters between the parties proposing various terms and conditions, a Senior Vice-President of LFRECC, Roy M. Pollitt ("Pollitt") sent a letter dated

December 3, 1973* stating that LFRECC was "pleased to accept your application for a construction loan" under the following terms:

(a) plaintiffs were to provide a satisfactory MAI appraisal;

(b) the construction loan was to be $6,000,000 for a 36 month term at a rate of 4% over National Bank of Westchester's moving prime rate plus a 3% commitment fee;

(c) the closing was to be within 75 days upon acceptance of "letter" by plaintiffs;

(d) the principals were to guarantee completion and repayment;

(e) LFRECC and its architects were to review plans and specifications and find them acceptable;

(f) LFRECC's Executive Loan Screening Committee was to give final approval of the loan;

(g) a Participation and Service Agreement was to be executed by the banks participating in the loan and found satisfactory to LFRECC; and

* An earlier letter dated November 15, 1973 was sent by Pollitt to plaintiffs proposing similar terms which were not accepted by plaintiffs.

(h) a formal written commitment letter was to be issued pending receipt by LFREEC of various documents from plaintiffs which were to be subject to approval of LFRECC.

If plaintiffs agreed to the foregoing terms, they were to pay a "non-refundable" fee in the amount of $20,000. By the terms of the letter, the payment of this fee obligated LFRECC to complete arrangements for this loan in approximately 45 days and in the event that LFRECC did not do so, the $20,000 fee would be refunded to plaintiffs. This contract to issue a firm commitment was accepted by plaintiffs and $20,000 was transfered to LFRECC by plaintiffs from their account at Citizens and Peoples National Bank of Pensacola.*

By late December 1973, the requested information on the Cordova project had been supplied to LFRECC by plaintiffs. In addition, Crowe and Stalnaker came to the offices of LFRECC on or about December 26, 1973 for a meeting with Pollitt and his assistants Brian Bergen and Muhlfeld to

* Plaintiffs' check #399 had been sent to LFRECC on November 28, 1973 to be held in escrow pending agreement on the terms of the commitment contract. Enclosed with the November 28th letter from G&S were almost all of the documents requested by LFRECC for its review.

finalize the financing arrangements for the Cordova project. At that meeting, various terms of the commitment letters were discussed and representations about the status of the loan were made by Pollitt.

Plaintiffs were presented with two letter agreements for their review and signature: (1) a construction loan commitment and (2) a permanent mortgage commitment. The construction loan commitment obligated LFRECC to loan or cause to be loaned to G&S $6,000,000 to pay for the construction of the proposed Cordova hospital. The second letter agreement also commited LFRECC to loan or cause to be loaned $6,000,000 for permanent financing upon the completion of the hospital construction. Both letters specifically stated that the "loan had been approved" and that the closing would be dependent upon the satisfaction of a number of conditions, some of which had been enumerated in the December 3, 1973 letter agreement.

An item of much importance was item 3 of the construction loan agreement which provided that the commitment was subject to Executive Loan Screening Committee ("Loar Committee") approval. Before the signing of the letter by Crowe and Stalnaker, Pollitt had advised the plaintiffs that the Loan Committee would not be able to meet

on its scheduled date in December to consider the Cordova submission. Plaintiffs expressed concern about obtaining formal approval of the Loan Committee prior to G&S's acceptance of the commitments and both before and after the signing of the agreements, Pollitt assured them that he had obtained the approval of the members of the Loan Committee and that as far as he was concerned this condition had been satisfied. The obtaining of Loan Committee approval orally from Committee members was within the ordinary course of LFRECC affairs, a fact admitted by Pollitt when he stated that there were occasions where oral approval had been obtained from Loan Committee members.

The remaining items of both commitment contracts pertained to requirements to be performed by plaintiffs upon the actual closing of the loans, i.e. the obtaining of title insurance, the payment of closing costs, etc. As these conditions were dependent upon the actual closing, plaintiffs did not expect to begin performance until LFRECC notified plaintiffs that it was unconditionally ready to close the loan and to set a date for the closing.

In reliance on the representations by Pollitt that LFRECC had agreed to loan the money, plaintiffs signed the commitment contracts and simultaneously paid LFRECC a commitment fee in the amount of $160,000 (in addition to the

$20,000 previously paid) in consideration for LFRECC's obligation to loan G&S $6,000,000 for construction and permanent financing. Plaintiffs never would have paid this fee had they thought the commitment agreements were not "firm" or subject to subsequent modification by LFRECC.

Upon the finalization of the commitment contracts, plaintiffs sought an advance on the construction monies that LFRECC was committed to loan to plaintiffs. As LFRECC did not lend money other than for real estate investments and the closing had not yet occurred, Pollitt suggested that it would be preferable for plaintiffs to obtain personal unsecured loans from a member bank of LFRECC, defendant National Bank of Westchester ("NBW"). Accordingly, at the December 26th meeting, Pollitt telephoned NBW to advise NBW concerning LFRECC's commitment to plaintiffs, the status of the Cordova project, and plaintiffs' need for a first advance on the promised construction monies. A meeting was arranged for Crowe and Stalnaker with NBW officers later in the afternoon of December 26th. Plaintiffs were accompanied by Muhlfeld to NBW where arrangements were made for the advance with John Battista ("Battista"), a loan officer at NBW. On the express representation from Pollitt that the loan had been approved and the financing for the hospital project would be imminently forthcoming from LFRECC, NBW modified its customary prohibition against loaning to out-of-state individuals who were not customers of the bank and

agreed to provide $300,000 to plaintiffs on an unsecured basis. As reflected in a memo by Battista to Files dated December 28, 1973:

> "Yesterday afternoon Roy Pollitt called on behalf of the principals of the subject requesting that NBW extend a short term $300,000 loan pending the closing of LFRECC's $6,000,000 construction loan on a 167 bed general care hospital to be constructed in Pensacola, Florida.... G & S needs the funds by 12/31 and the urgency was brought about by the fact that LFRECC had cancelled a screening committee meeting scheduled for 12/27 so LFRECC cannot advance any funds yet.
>
> We very specifically stated that were it not for LFRECC we would not consider this request."

That NBW relied on the representations of Pollitt and treated this loan as an "advance" is further evidenced by the fact that the formalities of executing the loan documents were dispensed with. Stalnaker and Crowe both signed documents, but at that time there was no corporate resolution of G&S or power of attorney from Greskovich. In fact, NBW neglected to obtain Stalnaker's signature on the guarantee and it was furnished later. Nonetheless, the $300,000 loan was agreed to by NBW and the funds were transferred shortly thereafter to plaintiffs who expended the funds to further the project. Ultimately, NBW assigned the note to LFRECC, thereby confirming the fact that the parties considered the $300,000 loan as a de facto advance from LFRECC to plaintiffs.

The Loan Committee finally met to consider the Cordova project on January 15, 1974. As the minutes indicate, members of the Loan Committee considered the submission package on Cordova, discussed the proposal and ultimately gave approval to the Cordova project. As reflected in the minutes of the meeting:

> "The Cordova Doctors Hospital loan be approved subject to the qualifications shown in the submission, and the securing of an unqualified take-out, by a financially responsible institution."

There was no reservation either at the December 26th meeting or in either commitment contract that the agreements were subject to any modification or conditional approval by the Loan Committee.

Shortly after the Loan Committee meeting, Pollitt advised plaintiffs of the Loan Committee's resolution and assured them that the securing of a firm take-out or permanent mortgage could be arranged. Plaintiffs protested as to this assertion of an unbargained-for condition, but having paid LFRECC $180,000, having expended the $300,000 loan and not having other available financing sources, plaintiffs diligently pursued a search for permanent financing.

In connection with plaintiffs efforts, Crowe re-contacted First Federal Savings and Loan of Erie ("Erie"), a bank where plaintiffs had been simultaneously attempting to secure financing. Erie agreed to issue a standby commitment to satisfy LFRECC's newest demands and Erie's commitment was presented to LFRECC. After numerous telephone calls and letters, it became apparent to plaintiffs that financing from Erie would not be acceptable to LFRECC.

While Pollitt testified it was his job to secure the take-out financing, and while such a take-out was now claimed to be a condition to LFRECC's going forward with the financing, Pollitt did virtually nothing to arrange appropriate financing. Crowe, however, contacted a variety of institutions, brokers and lenders including Columbia Savings and Loan Association, Progressive Mortgage Corporation, Blanchard and Calhoun Mortgage Company, Mellon National Mortgage Company, Financial Packaging Corporation, Sonnenblick Goldman Corporation and Ivor B. Clark & Company. Although Crowe did succeed in arranging several standy take-outs, a memo from John Kuhn, an officer of NBW, to Files dated February 6, 1974 indicates that LFRECC advised that none should be accepted:

> "Roy [Pollitt] stated that the subject has obtained several stand by takeouts, however, he has recommended to G & S that they do not commit for any due to the excessive rates on each. Roy feels that G & S can get a better deal if they keep looking."

Despite LFRECC's lack of favorable response to these standby commitments, Crowe continued to urge Pollitt, by letter dated April 14, 1974 to "continue your efforts to find an acceptable standby commitment." As none of these contacts nor efforts by LFRECC resulted in the take-out financing required by the Loan Committee, the financing through LFRECC was stalemated.

The original $300,000 note was payable on March 1, 1974 but due to the failure of LFRECC to close the loan as planned, both LFRECC and G&S sought an extension of the loan for another 90 day period and, in consideration for the extension, the amount outstanding was to be reduced to $250,000 and a mortgage offered on the land which was to be the hospital site. On or about March 6, 1974 Pollitt authorized the release of $50,000 from the $180,000 commitment fee being held in escrow to reduce the plaintiff's loan at NBW to $250,000. Later in April 1974, Crowe requested that the balance of $130,000 held in escrow be applied to reduce the NBW loan outstanding, but Pollitt refused to cooperate. Shortly thereafter, NBW made a formal demand by letter dated April 19, 1974 that the balance of the $300,000 loan be paid.

POINT I

THE PARTIES ENTERED INTO A BINDING COMMITMENT CONTRACT AND DEFENDANTS ARE LIABLE FOR THEIR BREACH THEREOF

A. Commitments to Loan Money are Binding Contracts

An agreement to loan money or cause it to be loaned is a valid contractual agreement and a lender who refuses to lend money pursuant to the agreement is liable for the breach thereof. Avalon Construction Corporation v. Kirch Holding Co., 256 N.Y. 137 (1931); Stanish v. Polish Roman Catholic Union of America, 484 F.2d 713, 723 (7th Cir. 1973); Annot., Damages, 36 A.L.R. 1408 (1925). The letters of commitment sent by LFRECC constitute two separate offers to enter into contracts to provide construction and permanent loans for the Cordova project. Acceptance by the plaintiffs in signing these agreements and paying $180,000 in consideration for the obligation of defendants to make the agreed-to loans resulted in a contractual agreement binding on both parties. Contrary to the defendants' contention, the fact that there were qualifications in the letters of commitment does not reduce the agreement to the status of a mere agreement to agree. As the court stated in Biothermal Process Corp. v. Cohu & Co., 119 N.Y.S.2d 158 (N.Y. Co. 1953):

"The agreement to agree doctrine is that there must be agreement upon all the essential terms of a contract--not that there must be agreement upon all the things which have a logical or business relation to that contract.

* * *

I think defendant's letter means that defendant will raise and make available the money required for those purposes and that instead of arbitrarily dictating defendant's own demands as to the means of raising it, defendant will sit down and discuss what means should be adopted. As defendant had the right to decide the means and also the terms on which these means would be used, failure to agree on those means and terms was not a failure to agree on the essential terms of defendant's agreement to raise the money." (emphasis added).

B. Plaintiffs were not Obligated to Perform any Conditions Precedent

Defendants have argued that the commitment agreements are not binding on them due to the fact that certain conditions precedent have not been met by plaintiffs. In particular they contend that the condition of Loan Committee approval was not met. The evidence plaintiffs will adduce at trial will show that this condition was waived or satisfied by defendant LFRECC. The plaintiffs will show that at a meeting on or about December 26, 1973 they were told by Pollitt that approval of the Loan Committee had been obtained and that submission to the Loan Committee in January was a mere formality. Indeed, this assurance that approval of a construction loan had been obtained and satisfied was the

sole reason plaintiff decided to transfer $160,000 as a non-refundable fee to secure defendant's performance of this obligation. Thus, the payment of the commitment fee and its acceptance after Pollitt advised that informal approval had been obtained constituted a waiver of any further conditions to be performed by LFRECC, e.g., a completed offer and acceptance culminating at the signing of the letters of commitment and payment of the fee. Moreover, NBW's willingness to loan $300,000 to G&S on an unsecured basis was based entirely on assurances by LFRECC on the certainty of financing. The representations made by Pollitt and Muhlfield to officials of NBW indicated a course of conduct to plaintiffs constituting a waiver of formal Loan Committee approval. The $300,000 loan was considered by the parties to be an advance of the first installment of the construction loan. The testimony will show that NBW actually looked to the loan commitment for its collateral rather than to the plaintiffs as personal guarantors. This conclusion is evidenced by the fact that copies of the notes and guarantees were not provided to the plaintiffs at the time of execution and that Greskovich did not sign the note and guaranty or provide a power of attorney until only sometime after the NBW monies were received.

Finally, Pollitt was an officer of LFRECC who held himself out to plaintiffs as a representative of LFRECC with authority to waive conditions such as Loan Committee approval.

LFRECC can be held liable under a theory of agency for the waiver of the condition by Pollitt. Where a party is induced to enter a contract upon the representations of an agent who has apparent authority to make such representations, the principal is liable for all damages naturally flowing from the party's reliance on the assertion of authority. Harris v. Tams, 258 N.Y. 229, 179 N.E. 476 (1932); Warren A. Seavy, Agency §124 at 215 (1964).

This conduct by both defendants constitutes proof that the condition of Loan Committee approval had been waived. A waiver may be proved by a course of acts and conduct; by neglecting to act; or by inducing a belief that there was an intention and purpose to waive: it is not necessary that the waiver should be direct and positive, but it may result from implication and usage or from an understanding between parties which is of a character to satisfy the mind that a waiver is intended. Carfi v. DeMartino, 46 N.Y.S.2d 134 (1944).

Defendants also argue that the arrangement of a take-out was a further condition to be performed by plaintiffs. This purported modification of the commitment contract is not binding on plaintiffs. Plaintiffs negotiated for and agreed to a commitment by defendant LFRECC subject

only to the formal closing conditions imposed upon plaintiffs by the December 26, 1973 agreements. A unilateral modification of the commitment contract does not impose any condition precedent on plaintiffs. As one court has stated with respect to a commitment contract to loan money:

> "It is elementary that once its offer had been accepted, [the lender] could not withdraw it or vary its terms." Stanish v. Polish Roman Catholic Union of America, 484 F.2d 713, 722-23 (7th Cir. 1973).

Moreover, even if this court characterizes the arranging of the take-out as a condition, the evidence at trial will show that LFRECC had the obligation to arrange this take-out. Plaintiffs demanded that LFRECC search for permanent funding and plaintiffs did take steps to contact other brokers and lending institutions in an effort to arrange the take-out financing. Plaintiffs' position is that they pursued all alternatives when faced with LFRECC's arbitrary refusal to close the loan. Plaintiffs' efforts only augmented, rather than substituted for the duty of LFRECC to provide or arrange standby, take-out or permanent financing. Since LFRECC had the continuing duty to arrange the take-out, its own failure to fulfill that duty prevents LFRECC from claiming it was a condition precedent; on analagous facts, a New York federal district court held:

> "the Court finds defendants to be at fault in the failure of the conditions precedent to plaintiff's commission, in that they failed or refused to make certain 'good faith deposits' required by the lenders under the loan commitment and otherwise acted in a manner inconsistent with their obligations thereunder, thereby causing the lenders to terminate the commitment in September 1969. Such being the case, defendants cannot now invoke the conditions precedent recited in the August 1967 agreement as a bar to plaintiff's claim." 387 F. Supp. at 864.

Defendants final argument is that plaintiffs have refused to perform the numerous other conditions to the commitment contracts thereby preventing the existence of a binding contracts. Yet, these conditions were only closing conditions or, as one commentator observed, mere "ground rules ... in closing the loan." I. A. Seltzer, Construction Lending from Borrower's Viewpoint, PLI -- Construction Lending 51, 57 (W. Keenan ed. 1973). None of these remaining conditions needed to be performed until a date had been set for the closing and LFRECC cannot interpose the failure to obtain permanent financing as a paramount condition and at the same time assert failures to perform subsequent conditions to excuse their breach. In any event, LFRECC's interposition of a condition of arranging a take-out excuses plaintiffs from performance of these remaining conditions:

> "[A]ctive conduct of the conditional promisor, preventing ... the fulfillment of the condition, eliminates it and makes the promise absolute." Aimes v. Wesnofske, 255 N.Y. 156, 163 (1931).

As the New York Court of Appeals long ago emphasized:

> "It is a well settled and salutary rule that a party cannot insist upon a condition precedent, when its non-performance is caused by himself." Young v. Hunter 6 N.Y. 203, 207 (1852); accord, Weniger, supra 387 F. Supp at 864.

See also Simon v. Electrospace Corp., 28 N.Y.2d 136, 269 N.E.2d 21, motion denied, 28 N.Y.2d 809, 270 N.E.2d 730 (1971); Koolaire Service & Installation Corp. v. Board of Ed., 28 N.Y.2d 101, 268 N.E.2d 782 (1971); Stern v. Gepo Realty Corp., 289 N.Y. 274, 45 N.E.2d 440 (194); 10 N.Y. Jur. §381 at 374 and cases cited therein.

POINT II

GIVEN A FINDING OF BREACH OF CONTRACT BY DEFENDANT LFRECC, PLAINTIFF IS ENTITLED TO A CANCELLATION OF THE $300,000 INDEBTEDNESS, A RETURN OF THE COMMITMENT FEE AND CONSEQUENTIAL DAMAGES

A. Plaintiffs are Entitled to a Cancellation of the $300,000 Indebtedness

Plaintiffs seek cancellation of the $300,000 promissory note which they originally executed to NBW and which NBW subsequently assigned to LFRECC. Plaintiffs are entitled to a cancellation of this indebtedness under the doctrine of equitable estoppel. That doctrine provides:

> "An estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury. When this occurs it would be inequitable to permit the first to enforce what would have been his rights under other circumstances." Metropolitan Life Ins. Co. v. Childs Co, 230 N.Y. 285, 292-93, 130 N.E. 295, 298 (1921).

See also Mercury v. Loew's Hotel, 273 N.Y.S.2d 856 (1966); Clark, Principals of Equity, Sec. 29, p. 34; Emerson Radio and Phone Corp. v. Standard Appliances, 112 N.Y.S.2d 615 (1951).

Plaintiffs accepted the loan on the express representation by Pollitt that the construction monies would be forthcoming. The monies from NBW were utilized to pay off

expenses incurred on the project and to permit further construction on the site. Given LFRECC's refusal to close the loan and the damages ensuing therefrom it would only compound the losses which plaintiffs have sustained if plaintiffs are now required to repay that loan. Thus, the indebtedness for which LFRECC has interposed a counterclaim is the direct result of LFRECC's own conduct upon which plaintiffs relied to their detriment. The equitable doctrine of unclean hands requires that defendants be estopped from asserting their claims on the note, even if defendants are not otherwise liable in damages.

B. All Commitment Fees must be Returned to Plaintiffs

Plaintiffs paid commitment fees totalling $180,000 to defendant LFRECC based on representations by Pollitt and the agreement by plaintiffs to the terms of the commitment contracts. Plaintiffs believed that they entered into an contract with LFRECC subject only to plaintiffs' fulfillment of closing conditions. At the time when the fee was paid plaintiffs had no reason to believe that defendant would interpose the further condition of a purported modification by the Loan Committee.

In Pasadena Associates, supra, the court applied the principle of restoration of monies paid under mistake of fact

and held that defendants were liable to plaintiff Pasadena hospital for a return of monies advanced "in preparation for the closing of the proposed loan." 460 S.W.2d at 480. The court stated:

> "We think that under these circumstances [lender did not make the loan], ... Pasadena Hospital should be restored the property or value of property which it parted with under a contract which was never completed and from which no benefits were received." Id.

The commitments agreements refer to the commitment fee as being "earned." Since LFRECC repudiated its obligations under those agreements, there was a failure of consideration for the fee. Moreover, retention by defendant LFRECC of this amount would be unduly punitive and cannot qualify as liquidated damages under any theory of law. The evidence at trial will show that the $6,000,000 was never held in readiness for the loan. More importantly, a lender has no right to retain a special deposit or a commitment fee where the loan failed to close due to the inaction of the lender. Pasadena, supra.

C. Plaintiffs Seek Compensatory Damages for Their Loss of Investment and Expenses Incurred in Obtaining Alternative Financing

It is an axiom of contract law that recovery for breach of contract shall include such damages as were rea-

sonably within the contemplation of the parties. Hadley v. Baxendale, 9 Exch. (Eng.) 341, 354 (1854). The rule of reasonably foreseeable damages has been held to apply to breach of a contract to loan money. Stanish v. Polish Roman Catholic Union of America, 484 F.2d 713 (7th Cir. 1973), Annot., Damages, 36 A.L.R. 1408.

Where plaintiff pleads special damages for breach of a contract to make a loan, courts have used the out-of-pocket standard as the measure of damages. See J. D. Fuchsberg, 10 N.Y. Damages 695 (1965); e.g., St. Paul at Chase Corporation v. Manufacturers Life Insurance Company, 262 Md. 192, 278 A.2d 12 (Md. App. 1971). See also Avalon Construction Corporation v. Kirch Holding Company, 256 N.Y. 137 (1931).

As the court in Avalon, supra, recognized:

> "The prospective borrower, however, may recover special damage which an inability to obtain the money, under the peculiar circumstances of his case, has actually caused him.
>
> * * *
>
> The borrower may go into the market the next day after breach, and get the money without incurring any loss, or he may not be able to get it without suffering a loss, in which case the measure of damages is the loss he suffers." 256 N.Y. at 142

Similarly in St. Paul, supra, plaintiff sought damages for defendant corporation's cancellation of a commitment it had made for permanent financing of an apartment building to be built by plaintiff. After affirming the lower court's finding of defendant's liability for breach of the commitment contract, the court ruled that if the plaintiff was to be placed

> "... 'so far as possible, by monetary award, in the position it would have been if the contract had been properly performed,' it must be permitted to recover those items which it has been obliged to pay out or for which it is liable that are connected with the erection of the buildings and which in the ordinary course of circumstances have been paid from the loan from Manufacturers.... Thus, portions of the construction costs paid by St. Paul or for which it still remains liable are part and parcel of St. Paul's loss directly chargeable to the breach by Manufacturers." (emphasis added) 278 A.2d at 41

Applying this measure of damages, the court in St. Paul permitted plaintiffs the recovery of a variety of costs related to the project including extension fees, attorneys fees, architect fees, interest on existing mortgages, fees for obtaining the loan and construction costs such as building permits, utility charges, leasing and advertising expenses and contract extras.

Accordingly, on the authority of St. Paul, Avalon and Stanish, defendant LFRECC is liable for all the elements

of damage itemized in the Pre-Trial Order which will be proven by plaintiffs' testimony at trial.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request judgment in their favor in all respects and for such other and further relief which this Court may deem just and proper.

Respectfully submitted,

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TRANSCRIPT OF CONFERENCE BEFORE HONORABLE IRVING BEN COOPER, MARCH 30, 1976 (pp. 94A-101A)

dhsr

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

G & S DEVELOPMENT,

Plaintiff,

- v s -

74 Civ 2451

LINCOLN FIRST FEDERAL ESTATE CREDIT,

Defendant.

----------x

B e f o r e :

HON. IRVING BEN COOPER,

District Judge.

New York, N. Y.
March 30, 1976 - 12:45 p.m.

A p p e a r a n c e s :

WILLKIE, FARR & GALLAGHER, ESQS.,
Attorneys for Plaintiff;
By: MICHAEL B. TARGOFF, ESQ.,
PAULA MUELLER, ESQ., of Counsel.

MC CARTHY, FINGAR, GAYNOR & DONOVAN, ESQS.,
Attorneys for Defendant;
By: RAYMOND P. O'KEEFE, ESQ.,
ROBERT REDIS, ESQ., of Counsel.

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THE COURT: Let the record show that this matter came to me as a result of a plea that I received in a criminal case which was set for trial, and all indications at the time were that there would be no possible plea. The Government, however, at the last moment, came up with a piece of evidence that was brought to the attention of the defense and a plea of guilty was entered.

I then saw fit to contact my brothers to find out whether I could help them fill up the gap until my regular trial engagements came to pass. Among the cases that I received then in this time was this particular case from Judge Weinfeld.

So on March the 24th, with Mr. Targoff here and Mr. Redis and Mr. O'Keefe, I went into the subject of settlement. I emphasized what I said to them orally, and what I am not afraid to put on the record, an assertion that I have made repeatedly in recent months, and which I gather is the concept of some of my colleagues, and that is that giving all due credit to the zeal and the earnestness of jurors, many of these cases seem to be beyond their capacity to understand or to come up with a verdict that is consistent with the facts and the law.

Aside from that, I have always believed, in all the years I have been a judge, that every attempt should be

made between conscientious counsel and with a well-meaning judge to see if cases coming before the Court can be, without any pressure of any kind, satisfactorily adjusted.

I am pleased to be able to relate that in the vast majority of cases in which that approach was taken those cases have resulted in settlements and have been satisfactory to the litigants and to their counsel. I shall continue to do this even though I feel that the amount of energy and the amount of time that is entailed is enormous, and certainly the amount of energy given by the judge in most of these settlements, the amount of energy expended, far exceeds the energy which the judge will have to put forth at a trial.

I asked counsel, during the course of the one-hour conference on March 24th, and that was a conference under pressure of other matters, to see if their differences could be adjusted, and that I was ready to help out if, as and when that became necessary. And we fixed today's date, 12:45, for a resumption of the conference.

I learn that since March 24th counsel has only spent a matter of minutes, a few minutes, face to face. I am sure that was not done to upset the judge or to thwart the judge. I am going to credit that to a misunderstanding of what I expected of them. I thought I had made it clear,

but I am making it clear, and beyond cavil right now, counsel are directed -- not requested -- I am directing counsel to sit down and devote a great deal of time, face to face, in negotiating these somewhat complicated issues, certainly complicated for a jury, and resolve those issues and come up with something that looks like the path of peace that may be accomplished.

I have been too long at it to omit the observation that the time and energy spent on making peace, whether on an international scale or on a local scale or in a family, is far more difficult than putting on your battle gear and going into surgery.

I am willing to do my part, but I certainly want counsel to do theirs, and I do not want to have the record indicate that I am criticizing. I have respect for their earnestness. My only criticism is their failure to translate into tangible, overt performance what I expected them to do in respect to negotiation.

They understand now, on and off the record, that on the record I have given a direction and I want that direction fulfilled, and fulfilled promptly.

This case has been set down for trial next week. I am willing to extend the time, if necessary, but not to the point where I jeopardize other commitments that I have

made to other counsel who are ready to go forward. In some instances there are defendants languishing in jail, and they are entitled to their cut of justice and their turn of the judge's attention and devotion.

With that understanding, then, gentlemen, I want a thorough and exhaustive attempt at negotiation. I know you will be gentlemen and that you will not make it impossible by deportment that is offensive and that I do not think characterizes any of you.

I do not want anything to happen that will interfere with the settlement. Exhaust yourselves as much as you possibly can. Go back to your clients. If this does not sound good, maybe something else by way of a counter offer may turn the table.

Be practical at all times. Do not be too ready to rely solely on what a case might indicate. When you sit down to make your peace, you make no concession as to responsibility and law. So from that point of view, in particular, it behooves you to take down your back hair and open up frankly with one another and not play games. Communicate fully and without reservation.

Mr. Targoff, have I your statement on the record that that is exactly what you will do?

MR. TARGOFF: Yes, your Honor.

dhsr

THE COURT: Mr. O'Keefe and Mr. Redis, have I got yours?

MR. O'KEEFE: Yes, sir.

MR. REDIS: Yes, sir.

THE COURT: Very well.

Today is Tuesday, I would like to get a report of how things look by Friday of this week. That means if it is possible at all today to spend time, and by "time" I mean hours, if necessary, in order to sort of bring this to a head. Certainly to reduce the number of unresolved phases so that the judge might be able to tackle or help out. But to leave the whole thing to me as though I have it in my power to pull out a magic wand is absurd.

I think this case has all the earmarks of a case that should and can be settled, but all I ask you to do is do your utmost.

MR. O'KEEFE: Do you want to see us Friday?

THE COURT: I will call you or have you call me on Thursday as to whether you come down here or how I want it on Friday. But I will not invade any engagement that you have that cannot be pushed aside. I will understand it.

I take it that unless you tell me that there is something that is likely to interfere with your sitting down and giving the time that I have indicated between now

and Friday, I want you to speak up now.

Mr. Targoff told me earlier that he has a matter on Monday that will take an hour or so, and I answered him readily, "I will understand that, and you have your hour or so. Don't worry about it."

These things I am prepared to recognize and have never done otherwise. But what I must insist on is that you give that devotion and that concern to the negotiation that you do when you go into the trial room.

I go even further and say that it takes more doing and greater capacity and a greater challenge to sit down at settlement negotiations than it does to go into the courtroom. Anybody can say, "Let's wheel him into surgery." How do you avoid surgery?

Does that make some sense to you, Ms. Mueller?

MS. MUELLER: Yes, sir.

THE COURT: Can I count on you to give your full measure of support?

MS. MUELLER: Yes, you can.

THE COURT: Very well, there it is.

But we will let you know on Thursday, and I hope on Thursday you will be able to give me an indication of good news on the telephone when you are called. Maybe we can obviate the necessity of getting together on Friday.

But let us see. There it is. Do not waste this.

Let the record also show -- I think it is a good thing to nail it down -- that this is an example of what we try to do.

I have a death case going on right now. I excused the jury at a quarter of one in order to be able to come up here and meet counsel. I came up. I should say I greeted them at approximately eight minutes to one. It is now twelve minutes to two. Between twelve minutes of two and 2:15, when my jury returns, I will grab a Hershey bar and a glass of milk or a cup of tea.

Now, you match that. If I do it, you can do it. That is it. And I maintain that is nothing exceptional, that is what every judge in this building is doing all the time. Nothing new about it.

When you tell a jury to come back at 2:15, you do not keep them waiting if you want their respect, if you want them to listen to the charge, if you want them to believe that the judge is deeply wrapped up in the doing of justice. And I will be down there at 2:15.

I have spent pretty near 50 minutes with you. Now go and do your share. I am counting on you. I have every faith in you. That is it.

PLAINTIFFS' REQUEST TO CHARGE

(pp. 102A-115A)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G&S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,	:	
Plaintiffs,	:	Index No. 74 Civ. 2451 (IBC)
-against-	:	
LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,	:	
Defendants.	:	

The Plaintiffs respectfully petition the Court to charge the jury in accordance with the attached jury instructions.

Respectfully submitted,

WILLKIE FARR & GALLAGHER

By _____

Attorneys for Plaintiffs
G&S Development Corp.,
Frank J. Greskovich and
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REQUEST TO CHARGE NUMBER 1

Preliminary Charge

Members of the jury, we come now to that portion of the trial where you are instructed on the law applicable to the case and then retire for your final deliberations. You have now heard all the evidence introduced by both sides and through arguments of their respective attorneys you have learned the conclusions which each party believes should be drawn from the evidence presented to you.

First, then, there are certain basic principles which should guide you in your deliberations. Briefly, they are that you are bound to accept the law of the case as I give it to you, whether or not you agree with it; further that you must not infer from my rulings or anything I have said during the trial that I hold any views for or against any party to this lawsuit, my views being completely irrelevant to your determination, in any event; further, that you may not draw any inference from an unanswered question nor consider testimony which has been stricken in reaching your conclusion; further that in deciding the degree of weight you choose to give to the testimony of any particular witness, there is no magical formula which can be used. The tests used in your everyday affairs to determine the reliability or unreliability of statements made to you by others are the tests applied in your deliberations. Among the items to be taken into consider-

ation in determining the weight you will assign to the testimony of a witness are the interest or lack of interest of the witness in the outcome of the case, the bias or prejudice of the witness, if there be any, the age, the appearance, the manner of the witness as he gives his testimony from the stand, the opportunity that the witness had to observe the facts concerning which he testified, the probability or improbability of the witness' testimony when viewed in the light of all the other evidence in the case.

If you find that any witness has wilfully testified falsely as to any material fact, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unworthy of belief. You may accept so much of his testimony as you deem true and disregard what you feel is false. By the processes which I have just described to you, you, as the sole judges of the facts, determine which of the witnesses you will believe, what portion of their testimony you accept and what weight you will give to it.

The burden of proof rests on the plaintiffs, on their claims for damages and on the defendants on their counterclaims. That means that it must be established by a fair preponderance of

the credible evidence that the claims made are true. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance means the greater part of such evidence. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds. The law requires that, in order for a party to prevail, the evidence that supports his claim must appeal to you as more nearly representing what took place than that opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must resolve the question in favor against the party, be it the plaintiff or defendant who has the burden on the issue. It is only if the evidence favoring the party's claims outweighs the evidence opposed to these claims that you can find in favor of that party.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or you should find yourself in doubt concerning my instructions to you on the law, it is your privilege, if you so desire, to return to the courtroom for the purpose of having such testimony or instructions read to you.

In making the factual determination on which your verdict will be based, you may consider the exhibits which have

been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom. However, arguments, remarks, and summation of the opposing attorneys are not evidence nor is anything that I now say or may have said with regard to the facts, evidence.

It is important that the views of all jurors be considered and your verdict must be unanimous with all six members of this jury in agreement.

In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or displease anyone, be popular or unpopular or, indeed, any consideration outside the case as it has been presented to you in this courtroom. You should consider only the evidence -- both the testimony and the exhibits -- find the facts from what you consider to be the believable evidence, and apply the law as I now give it to you to those facts. Your verdict will be determined by the conclusion thus reached, no matter whom the verdict helps or hurts.

I will now instruct you with respect to the various claims on which the parties seek to recover and on which you must

therefore return a verdict as to whether or not the defendants are liable to the plaintiffs or the plaintiffs are liable to the defendants on the counterclaim.

REQUEST TO CHARGE NUMBER 2

Plaintiffs seek to recover damages from defendants for breach of a contract to make financing available for a proposed construction of a proposed hospital in Pensacola, Florida. In considering the testimony that has been introduced, you must determine whether an agreement had been reached between the plaintiffs and defendant on the contracts. Where there is a written offer or proposal by one party accepted by the other party, you must find mutual assent to a contract even if there are certain things which must be accomplished by either or both sides before performance can be demanded.

Plaintifffs contend that the two letters dated December 26, 1974 which were signed by both parties created valid written contracts, admittedly subject to certain further requirements, which obligated defendant LFRECC to loan or cause to be loaned to plaintiffs monies for the proposed Cordova project. Defendant denies liability and claims that the letter agreements never became binding because of the non-performance by plaintiffs of various enumerated conditions in the letter agreements.

The primary contention between the parties relates to the enumerated condition requiring approval by LFRECC's Executive Loan Screening Committee ("Loan Committee"). Plaintiffs claim that they were specifically told that the Loan Committee had

approved the loan orally but had not had a group meeting to formally approve the loan. Plaintiffs further claim they were told the formal approval was a matter of technical compliance with LFRECC procedures which would not hinder the loan. Plaintiffs claim, that in reliance upon the representation that there had been oral approval by the Loan Committee, they signed the contracts, paid $180,000 as a commitment fee to LFRECC and borrowed $300,000 as an advance from LFRECC's sister bank NBW. The doctors further claim that by reason of LFRECC's oral advice that approval was obtained and by reason of defendants allowing plaintiffs to borrow $300,000 from NBW and subsequently to spend this money on the project, LFRECC cannot contend that the condition of approval was not met and thereby avoid its contract.

These facts involve a principle of law called estoppel. The law of New York says that you may find an estoppel based upon word or deed of one party which induces another to rely on the representation and, in so relying, the latter party changes his position to his injury. When this occurs it would be inequitable to permit the former party to enforce what would have been his rights under other circumstances. Triple Cities Construction Co. v. Maryland Cas. Co., 4 N.Y.2d 443 (1958).

The elements necessary to find estoppel here are (1) a misleading representation by Mr. Pollitt, (2) ignorance on the

part of the plaintiffs that the representation was false or inaccurate and (3) change of position by the plaintiffs in reliance on Mr. Pollitt's representation resulting in damage to the plaintiffs. Parsons v. Lipe, 158 Misc. 32, aff'd, Parsons v. First Trust & Deposit Co., 243 App. Div. 681, aff'd, 269 N.Y. 630 (1936).

If you find that defendants by their conduct and representations, whether express or implied, caused or induced plaintiffs to believe that the Loan Committee approval had been obtained or was a mere formality and that relying thereon, plaintiffs signed the contracts, paid the $180,000 commitment fees and expended $300,000 for purposes of the Cordova project, you must find that defendants are estopped from denying there was Loan Committee approval.

REQUEST TO CHARGE NUMBER 3

A party who by its own conduct prevents performance or fulfillment of conditions cannot claim failure to satisfy those conditions as an excuse for its performance of the contract. Amies v. Wesnofske, 255 N.Y. 156 (1931); Young v. Hunter, 6 N.Y. 203 (1852).

Here LFRECC insisted upon the obtaining of "take out" or standby financing from a different bank before it would go forward with the loan. If you have found estoppel, then LFRECC's insistence on the "take-out" financing excused the doctors from performing any remaining or further conditions contained in the commitment contracts.

REQUEST TO CHARGE NUMBER 4

If you find that the defendant's obligation was dependent upon the arranging of a "take-out" or standby financing, you must examine the testimony and determine whom the parties intended to fulfill this condition. If you find that the arranging of the "take-out" was defendant's duty and that LFRECC did not satisfy this duty, you must find that plaintiffs are excused from the performance of any remaining or further conditions in the commitment contracts. Amies v. Wesnofske, 255 N.Y. 156 (1931); Young v. Hunter, 6 N.Y. 203 (1852).

REQUEST TO CHARGE NUMBER 5

If you find that the doctors would not have borrowed $300,000 from defendants and spent it or any part of it on the Cordova project but for LFRECC's representation that the Loan Committee approval was nothing but a mere formality or that approval had been orally obtained, then you must find that LFRECC is estopped to recover on the $300,000 note. Triple Cities Construction Co. v. Maryland Casualty Co., 4 N.Y.2d 443 (1958); Parsons v. Lipe, 158 Misc. 32, aff'd, Parsons v. First Trust & Deposit Co., 243 App. Div. 681, aff'd, 269 N.Y. 630 (1936).

REQUEST TO CHARGE NUMBER 6

If you find that the doctors are entitled to a verdict against the defendants, in determining the amount of damages to be awarded you may take into account the expenses which the doctors incurred in obtaining the contracted-for loans; the expenses incurred for attempting to arrange substitute financing; the construction costs incurred to date on the Cordova project; and the out-of-pocket expenses connected with the initiation and furtherance of the Cordova project, including the spending of the $300,000 borrowed from defendants.

REQUEST TO CHARGE NUMBER 7

If you agree with defendants that LFRECC can claim that there was required as a condition that "take-out" or standby financing be arranged, then you can only allow LFRECC to keep the $180,000 commitment fee if you find each of the following facts:

1. That in signing the commitment contracts, the doctors agreed that the Loan Committee could modify or condition their approval in any way. Stanish v. Polish Roman Catholic Union of America, 484 F.2d 713, 722-23 (7th Cir. 1973).

2. You also must find that the LFRECC held the money promised to be loaned in readiness for delivery to the doctors at the closing. See Chambers & Co. v. Equitable Life Assur. Soc., 224 F.2d 338, 343 (5th Cir. 1955); Rogers v. Challis, 54 Eng. Rep. 68, 70 (1859).

3. You also must find that the $180,000 is not disproportionate to the damages LFRECC actually suffered. Wirth & Hamid Fair Booking v. Wirth, 265 N.Y. 214, 223, 192 N.E. 297 (1934); see also J.D. Fuchsberg, 9 N.Y. Damages ¶86 (1965).

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THE ADMISSIBILITY OF PAROL EVIDENCE (pp. 116A-126A)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs,

-against-

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,

Defendants.

Index No. 74 Civ. 2451 (IBC)

----------x

MEMORANDUM IN SUPPORT OF ADMISSIBILITY OF PAROL EVIDENCE CONCERNING EXECUTIVE LOAN SCREENING COMMITTEE APPROVAL

Preliminary Statement

In their trial brief and motion to dismiss the complaint, defendants urged this Court to bar the admission of any parol testimony concerning the performance of the condition of Executive Loan Screening Committee ("Loan Committee") approval. Defendants contend the parol evidence rule applies here because the commitment contracts were fully integrated agreements, unambiguous in meaning and as such constituted the "complete total agreement and understanding of the parties." (Defendants' Brief, p. 28).

Plaintiffs contend that the parol evidence rule has no application here. First, contrary to defendants' argument, plaintiffs do not seek to modify or change by parol evidence any of the terms of the commitment contracts. Instead, plaintiffs proffer the oral testimony of the representations by defendants in support of their theory of equitable estoppel. Second, assuming arguendo that the parol evidence rule is at all relevant, the testimony plaintiffs seek to offer comes within recognized exceptions to the parol evidence rule. In sum, without this testimony, plaintiffs cannot show the intent or understanding of the parties with respect to an ambiguous term of the contract nor under the doctrine of estoppel can they show reliance to their detriment on defendants' words and conduct.

POINT I

AS PLAINTIFFS DO NOT SEEK TO ALTER THE TERMS OF THE COMMITMENT CONTRACTS, BUT INSTEAD PROFFER ORAL TESTIMONY TO PROVE ESTOPPEL, THE PAROL EVIDENCE RULE IS INAPPLICABLE

It is well established that the parol evidence rule does not apply where the proffered evidence does not vary or contradict the plain meaning of the written contract. See Richardson, On Evidence § 601, at 598 (10th ed. 1973). Plaintiffs are not seeking to modify the commitment contracts with respect to the condition of the Loan Committee approval. Plaintiffs admit that the commitment contract was by its terms subject to "approval" by the Loan Committee. Recognizing that this term is a valid condition precedent, plaintiffs instead seek to show through parol evidence that this condition was satisfied, waived or excused by representations of defendants. A theory upon which this testimony is offered is not to show modification of a written contract, but rather to prove the plaintiffs' case for equitable estoppel.

It is the law of New York that parol evidence is not excluded where equitable estoppel or waiver of condition is at issue. Imperator Realty Co. v. Tull, 228 N.Y. 447 (1920). In Imperator Realty, the New York Court of Appeals established the rule that a promisor who issues a written

contract subject to a condition for which the promisor has excused performance cannot invoke the parol evidence rule to preclude testimony on the excuse of the condition. See also Wood v. American Fire Insurance Company, 149 N.Y. 382, 44 N.E. 80 (1896); New York Contracts § 1507 at 253-54.

The parties in Imperator Realty had entered into a written contract for the exchange of pieces of real property. A material condition contained in the contract was that the seller cure the property of all building code violations prior to closing. Contemporaneous with the execution of the contract, it was orally agreed by the parties that in lieu of discharging any of the existing or potential violations on either property, either party could deposit with a certain title insurance company sufficient cash to discharge the violations. Thus, in essence, the oral agreement did not purport to vary the condition of curing the violations, but rather altered the mode of performing that condition.

Prior to the closing, defendant repudiated the written contract claiming plaintiff's failure to perform the condition precedent. Plaintiff argued that defendant should be estopped from asserting the condition based on the oral agreement, and on this theory sued for breach of contract for defendant's refusal to close the transaction.

At the trial, the jury vindicated the plaintiff in all respects, rendering a verdict in its favor. On appeal from the judgment entered on the verdict, defendants claimed that it was error under the doctrine of the parol evidence rule to admit testimony of the oral agreement. The Court of Appeals in a well reasoned opinion with concurrence by Judge Cardozo upheld the trial court. The Court held that admission of parol evidence of the waiver of the condition to prove plaintiff's theory of estoppel was not legal error.

The Court reasoned that the oral agreement was neither inconsistent with the written contract nor did it substitute a new contract for any material part of the written contract. Relying upon the rule articulated in Thomson v. Poor, 147 N.Y. 402, 409 (1895), the Court quoted:

> "We know of no principle of law which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the non-performance within the original time as a breach of the contract. The original contract is not changed by such waiver, but it stands as an answer to the other party who seeks to recover damages for non-performance induced by an unrecalled consent." 228 N.Y. at 452. (Emphasis added.)

Further, Judge Cardozo's concurrence illustrated the principle with a common sense hypothetical which underscores the justice of the rule:

> "... The defendant by his conduct has brought himself within the ambit of this principle. His words did not create a new bilateral [or unilateral] contract.... They did, however, constitute the continuing expression of a state of mind, a readiness, a desire, persisting until revoked. A seller who agrees to change the wall paper of a room ought not to lose his contract if he fails to make the change through reliance on the statement of the buyer that new paper is unnecessary and that the old is satisfactory...." 228 N.Y. at 458.

The majority opinion noted that the fairness of allowing the plaintiff to provide the facts of estoppel by parol evidence was even more compelling since it was to the mutual advantage or convenience of both parties to waive or excuse the condition.

In thus affirming the settled law of New York that parol is admissible to prove the facts of estoppel, the Imperator Court also made clear that the foregoing rule obtains even where the underlying contract involves an interest in real property and is therefore subject to the Statute of Frauds. As was eloquently summarized by Judge Cardozo:

> "... The Statute of Frauds was not intended to offer an asylum of escape from that fundamental principle of justice. An apposite precedent is found in Thomson v. Poor, (147 N.Y. 402). In deciding that case, we put aside the question whether a contract within the

> Statute of Frauds could be changed by spoken words. We held that there was disability, or as we styled it, estoppel, to take advantage of an omission induced by an unrevoked consent." Id. at 457-58 (citations omitted).

Finally, Imperator articulated an additional rule relevant to the instant case. Where the issue of estoppel to assert a condition is raised, it is proper that the jury, as the finder of fact, decides whether the disputed conversation allegedly forming the basis of the estoppel did in fact occur. Id. at 450.

Imperator is controlling in this case. The proffered testimony by plaintiffs herein will show substitute performance of the condition of "approval." Obviously, satisfaction of a condition by substitute performance in no way contradicts the existence of the condition expressly stated in the parties' agreement. Thus the facts of this case are similar to those of Imperator where the Court admitted parol evidence to prove an oral agreement concerning the performance of a condition of the written contract.

Similarly, in this case as in Imperator, the fairness of allowing plaintiffs to prove the facts of estoppel is highlighted by virtue of the mutual advantage afforded the parties by their oral understanding: Plaintiffs required financing before the end of the year and forebore to seek alternate financing in consideration of an immediate firm

commitment. Defendants likewise benefited from issuing this commitment by receiving the valuable consideration of $180,000. It would be manifestly unjust to preclude plaintiffs' evidence as to representations made to them concerning the condition of the Loan Committee approval, representations which were the sole reason for the payment of the $180,000 commitment fee and incurring a $300,000 indebtedness. Furthermore, Imperator precludes the invoking of the Statute of Frauds where plaintiffs seek to prove these facts of estoppel and waiver.

In sum, defendants' attempt to preclude plaintiffs from their right to present their case on estoppel is without factual or legal support. The doctrine of equitable estoppel by definition requires proof of oral representations or conduct upon which plaintiffs relied to their detriment. See Plaintiff's Brief, p. 20. That doctrine is fully applicable to contract cases. Thus, it follows that evidence extrinsic to a contract must be admitted to prove the facts of estoppel. If defendants' position were the prevailing law, estoppel could never be proven in a contract case. Such a drastic manipulation of the parol evidence rule is unwarranted and, moreover, is without precedent. As the eminent commentator on equitable jurisprudence has stated:

> "the parol evidence rule is a rule which should not be applied so as to work injustice." Pomeroy, Equity Juris, § 858 at 324.

POINT II

THE DISPUTED TESTIMONY COMES WITHIN THE RECOGNIZED EXCEPTIONS TO THE PAROL EVIDENCE RULE

Item three of the loan commitment contract states that "this loan has been approved subject to ... Executive Loan Screening Approval." Defendants strenuously argue that there is no latent or patent ambiguity to this language or to what the parties intended the term "approval" to mean. (Defendants' Brief, p. 28). On the contrary, it is obvious that the term "approval" is subject to a variety of interpretations. For example, the contract on its face is silent as to whether the approval was to be oral, written, conditional, absolute or merely pro forma. Given these varied possible interpretations, it would be manifestly unjust to prevent plaintiffs from offering evidence to clarify their understanding of this disputed term of the contract.

Moreover, the consistent conduct of the parties subsequent to the execution of the commitment letters provides a practical construction to this ambiguous term. Kinderman v. Kinderman, 183 N.Y.S. 897 (Sup. Ct. Bronx Co., 1920); see 10 New York Contracts § 221 at 133. Plaintiffs will adduce evidence that both parties understood the term "approval" to mean, in fact, pro forma approval. Thus, plaintiffs justifiably seek to show by parol testimony exactly what the intent of the parties was with respect

to this condition and what they understood the term "approval" to mean.

It is a general rule in the construction of contracts that the contract is to be read in light of the circumstances existing at the time of its making. As a leading New York commentary summarizes:

> "... In order to determine the nature of the thing promised, recourse to the circumstances attending the execution of the writing may be had. Thus, in the interpretation of an agreement, the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning. A contract is to be construed in the light of the situation of the parties at the time it was made."
> 10 N. Y. Jur. § 219 at 131.

The foregoing rule that the surrounding circumstances should be considered in the interpretation of a contract applies with particular force when the language is susceptible to more than one meaning. Solomon Tobacco Co. v. Cohen, 95 App. Div. 297 (1st Dept. 1904). In such cases ambiguity on the fact of the contract creates a question of fact. This fact question can only be resolved by testimony to show the surrounding circumstances and the intent of the parties upon the execution of the contract. As New York Jurisprudence states:

> "... when different inferences may fairly be drawn as to the meaning and effect of the written language used, that the relation of the parties and the surrounding circumstances are to be considered by the jury in arriving at their intention." 10 N. Y. Jur. § 221 at 133.

Thus, in Kinderman, supra, "profit" was a disputed term of the contract. Although this term is one of obvious and common usage, the court nonetheless permitted the admission of parol evidence to clarify what the parties intended the term "profits" to mean. Similarly, in this case, the term "approval" is subject to a variety of constructions and requires extrinsic evidence to clarify the intent of the parties.

CONCLUSION

For the foregoing reasons, plaintiffs' evidence as to parol representations by word and conduct relevant to the issue of Loan Committee approval must be admitted.

Respectfully submitted,

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Michael B. Targoff
Paula J. Mueller,
Of Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

G & S DEVELOPMENT CORP., :
FRANK J.GRESKOVICK, :
BENJAMIN L. STALNAKER, :

Plaintiffs, : 74 Civil 2451

v. :

LINCOLN FIRST REAL ESTATE CREDIT CORP., :
NATIONAL BANK OF WESTCHESTER, :

Defendants. :

- x

April 5, 1976,
1 P.M.

Before:

Hon. Irving Ben Cooper,
District Judge and a Jury.

Appearances:

WILLKIE FARR & GALLAGHER, ESQS.,
Attorneys for plaintiffs,
Michael B. Targoff, Esq.,
Paula Mueller, Esq.

McCARTHY, FINGAR, GAYNOR & DONOVAN, ESQS.,
Attorneys for defendants,
Raymond P. O'Keefe, Esq.,
Robert Redis, Esq.

(A jury was duly impaneled and sworn.)

THE COURT: The openings, counsel.

MR. TARGOFF: Good afternoon, ladies and gentlemen. My name is Michael Targoff and I represent the plaintiffs, the two doctors and the building corporation which they formed, and I am about to tell you sort of a preview of the proof and the evidence that we expect we will prove from our witnesses and from certain depositions which I will read to you. A deposition is merely a statement that I have taken from some other witnesses before this trial. The judge referred to some of the procedures that the attorneys go through. Before the trial we try to gather some evidence and learn about the case. Some of those procedures did result in some pieces of evidence that I am permitted to read to you and I will ask the court permission to read some of that to you and I hope that I will be able to do that.

Now, whatever I am saying to you now, and after I speak to you on behalf of the defendants, it is not evidence. The judge will tell you that later, and I think he may have even mentioned it already. It is merely what I hope the evidence will show you.

Now, this case concerns a bank and some doctors who wanted to build a hospital and something called Lincoln First Real Estate Credit Corporation. I think you will hear

in some of the depositions and from some of the witnesses some nicknames for that. It makes it easier. People don't call it Lincoln First Real Estate Corporation. They give it nicknames. Like someone said I think NBW for National Bank of Westchester. You will hear LFRECC, Lincoln First. You will hear all sorts of names, but you will know that's what they are talking about. Now, there are a lot of terms that you are going to hear and we are going to do our best, both of us, to try to make you understand it. They are not easy to understand. You don't learn it in law school and I am sure you don't learn it in a lot of things you people have done. We have had to learn them and I know you will learn them with us and in fact if I make any mistakes, I hope somebody corrects me. Let me tell you about some of the terms. The first term is construction loan. Now, construction loan is where someone wants to build something but they don't have the money to build it. They might go to a bank, an insurance company, a financing institution or any other large entity who has sufficient funds-- it might even be an individual who has sufficient funds to lend you the money while you are building whatever it is you are going to build. Now, some of us may have mortgages or may have borrowed money at other times and you go into the bank and they give you the money. A construction loan

rgh 4

is a little different because you tell the bank or institutions it is going to cost X dollars, thousands or millions of dollars. In this case you will hear of a hospital that is going to cost six to seven million dollars. You say you are going to need this money to build the hospital. They say whatever they say about it, and you will hear plenty of that, and then if it is agreed and the loan goes forward the construction loan comes little by little as you are building. A floor goes down, you submit bills, architect's information and you get some money for the floor. Little by little it comes. Now, when the building is hopefully built you are sitting and you have a lot of money that you owe. Whatever you borrowed you owe. Now, again most people who are going to build a building of the kind involved here, they don't have six, seven million dollars in their pocket to pay for the building once it is built. If they had that they wouldn't have needed the construction loan. So what they have to try to do is get someone else now to lend them some money and it is really like a permanent mortgage. It is like someone, a builder might get a loan to build a house and then he wants to sell it. When he sells it to me I go out and get another loan and it is a different loan from my bank, or whomever, and that's my mortgage and I pay that off over 20 years or 15 years or whatever. Now, a

construction loan is different not only because it is piece by piece when the money comes out as the building is being built, but also it is just for a short time. It is basically to get the building and then somebody else pays off the construction lender. The lender is the person, of course, who gives the money. The borrower is the person who takes the money.

Now, in this case, I wish I could stop right now, but unfortunately there is another term that you are going to hear and that term is called a stand by mortgage, and it means what it sort of says. It is going to stand by. It is someone who is prepared, once the building is constructed, to lend you the money for a permanent mortgage, for a long time mortgage. He is ready. Now, why do I call it stand by and why isn't it called a permanent mortgage? Well, a stand by mortgage is somebody who really no one ever expects to use. He is there and he is standing by. He is there almost like an insurance policy because the lender, the construction lender, he wants to know that when he pays you all the money and you build your building someone is going to pay him. Now, he may be satisfied that the building is going to be a good building and you will have no problems getting a permanent mortgage at the end of it. You may be satisfied as the borrower. After all, it is your building and if you

don't get permanent money you are going to be in trouble, but you may be satisfied that you don't need any permanent mortgage, but either or both of you might decide "Well, let's get a stand by mortgage. Someone who is there in case we need him. Someone who will lend us the money. We don't expect to use it, but just in case." You will see the stand by mortgage generally has very expensive terms. Now, what do we mean by terms of a mortgage? Well, a mortgage, some of the terms of course will be how long it is going to be, what is the percentage, the interest rates, and in some of these commercial type mortgages, for buildings and the like, there are certain points. They call it points. What that is is certain dollars you have to pay right away. A point is in terms of a fraction of the whole borrowing cost. For example, if I can say, on a million dollars, one point is $10,000. A point is a percentage of the whole. Now, the stand by mortgage company, whoever is going to stand by and be ready, he doesn't want to lend you the money either. He knows he is juststanding by as an emergency and he is putting lots of points in and big high interest rates because he wants to encourage you to go to someone else. Why is he doing it? Well, he is doing it because he knows it is necessary, but also he gets paid for it. Everybody is interested in making dollars in this case. That's the banks.

The doctors want to build a hospital, they want to improve their practice, but the stand by mortgage company, they don't expect to do anything, they just want to be paid there.

Now, there are some more terms, unfortunately, something called the prime rate. That one probably most of us have heard about. The prime rate is the rate -- it is the best rate of interest that the bank will give to its best customers. Some of you know First National City Bank, for example, publishes every Friday a prime rate. It changes. It depends on supply and demand, how much money is available and a whole bunch of things that really have nothing to do with this case, but the fact that there is a prime rate. It is sort of like a scale from which other rates are measured. Now, some loans are made at the prime rate and others are made at percentage points above the prime rate. Now, the rate of the loan is the interest percentage that the borrower will pay. If you borrow a hundred dollars at 10 percent for one year, at the end of a year you have to pay $10 in interest. That means you give back the $100 and the $10 of interest.

Now, one more term and then I will stop talking about terms. It is something called a commitment. Now, what is a commitment? We all know what somebody means when somebody says will you commit me to that? Commitment

in the language of you are going to hear is where a bank or an institutional lender, someone who is going to lend the money, will commit, promise, if you like, agree, commit to lend money if certain things are done. Usually. You find in this case that there was a commitment issued by Lefrak, if I can call it LFRECC, and you will see that there will be plenty of discussion about various things that had to be done before the bank would actually be required and before the doctors and their corporation would be required to borrow the money and finish it. Again, if we can think of a home, you and I might agree -- I might agree to buy your house and we might have a contract, an agreement, a commitment to buy the house and that commitment might say that I will buy your house if I get a loan from the bank, because I can't buy your house unless I get a loan. Well, if I don't get that loan the contract is finished, goodbye. There may be some other circumstances, but generally speaking I think that's a fair statement. So the commitment, it still may be a good contract, even though something has to happen in the future before both parties have to do what the contract says they will do.

Now, the commitment you are going to hear about in this case are commitments either for construction money, a construction loan, a commitment for a stand by mortgage

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and commitments for permanent mortgages. Each commitment really means the same thing. It is a promise to do something provided certain things happen, but it is still a commitment.

Now, I think I can start talking about what evidence you are going to hear, the story you are going to hear, the scenario, what happened to these people, and again I think the best way to give you a program, because I think it makes it easier, is to think of a situation where someone owns a home and they want to put an addition on the home. They have a baby and they want to put another room on the home. They go out and they see an architect and they get a builder ready and they tell him that it is going to cost $6,000. It sounds fair and you would like to go forward with it. Then you have to borrow the money. So they go to a bank and they tell the bank this is what I would like to do. Here is my architect and my plans and the government said it is okay, I am allowed to build this extra room, and the bank says, "that's interesting. We would like to help you. Why don't you fill out an application." You fill out the application. You might start to do something then. You might have some ground broken getting it ready, pulling some trees out. Then you start the work hoping to get the loan. You call the bank up and the bank says "Okay, everything has been approved. Come on in and we will get

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the loan ready." Now, you come on in, and I want you to listen closely because some of this evidence that you are going to hear you may not hear. That again is filled with ambiguity, but there are certain rules of evidence. The judge has told you about those rules. I am going to tell you what I hope I can prove, what my witnesses will say. There are certain rules of evidence which may not permit me to have all of it come out and the judge will tell you that anything I have said is not evidence and if it doesn't come out on the stand you will have to forget that I have said it. Now, you go to the bank to get your loan after you have had this phone call and you see the piece of paper and it says "Subject to approval of so and so committee." You said"I could have the loan. I don't understand. You said they approved it." You are then told "Oh, they have approved it. Don't worry, but they haven't had a meeting, a formal meeting. We have to have formal meetings here. This is a bank. We have to have formal meetings, and they have to enter it in the minutes, but don't worry, your loan has been approved. In fact, give me a thousand dollars." I said "give you a thousand dollars?"The banks says "yes, we have to have a fee. You have to show good faith. Give us some money right now because we are pommitting to lend you this money and in case you don't want this loan, we

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have gone through this trouble, you give us some money." I give them some money. I might say a thousand is too much, maybe 500, but I give them some money. Then I say "Look, I thought I was going to have this money today and I need this room. Can you help me? I want to borrow some money because I have got to construct it and I need this money. Can you give me a personal loan at least in the meantime?" He says "Well, it is really not our business to give a personal loan. We are really a bank that gives improvement loans, but we are affiliated, we have a sister bank, a friend of ours and we are both owned by the same company. I willgive a call and see what I can do." You say "Gee, that will be nice." He calls up and he says to the person "Mr. Targoff is here and we are going to lend him some money. Everything has been approved, but we can't close, we can't close the deal, we can't give him the money yet. I would like to send him over to get a loan. Can I come over and get the loan?" I am driven over to the other bank and there I am, I am introduced to certain people. He says "who are you?" I say "Mr. Targoff." He says "why are you here?" I said "I was supposed to have a loan, everything was approved and I can't close the loan, but I need the money to do the construction. I have to get it done." He said "okay, let me call the other bank and see if this is right." He calls up.

Is this right? You don't hear what's said on the other side, of course. He gets off, he hangs up the phone and he says "Well, he said that's right, but I would like to talk to his boss tomorrow." "I would really like the money and I need the money." He said "How long do you need this money for?" And I said "I only need it until I get the money from the other bank to do my construction. As soon as I get that money I will pay you back." He said "When do you expect that will happen?" And I say "well, he said a couple of weeks" and he said "but look, I can't pay you back until I get that other money, so if you think it is going to take longer than a couple of weeks for me to get the other loan, then don't lend it to me for such a short period of time. Give me more time. Give them more time to make the loan if something happens." He says, "okay, you expect to get the loan in two weeks, I will give you 60 days. By that time you will have the loan." Okay, I take the money. I am very happy. I borrow $2,000. So now I have given the bank $1,000 and they have given me 2,000 back and I have more than when I started and I pay the builder off for what he has done already and he goes forward and I pay some other people off and they knock his walls out and everything. Two weeks later I get a call "Sorry but the committee didn't approve your loan." "What? What am I going

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to do?" He said "Well, go get another bank. We will help you. You have to get another bank who will promise, promise to stand by just in case you don't pay us at the end." I said "but that's not what you said. I don't know if I can get a stand by bank." He said "Well, we will help you. We will help you get it." What am I going to do? Terrific, what do I do? I send him some things. I went to this bank, that bank. I go all over and I try to get something. I get some. Not satisfied. The bank isn't satisfied. In the meantime, what's happening? In the meantime, now they say now you owe me $2,000. Where is the $2,000? I said I can't pay you the $2,000. I don't have the $2,000. I told you I didn't have the $2,000 unless you lent me the money. But the bank doesn't stop there. Not only does it says it wants the $2,000, but it says by the way we are going to keep your $1,000. Keep my $1,000. That's only the beginning. It's only the beginning. What happens next is we can't get a stand by loan. We can't get a permanent loan. We can't even get construction money any more because I am so far in debt. My improvement is gone. I may even lose my house. Now, with that as a mould let's put it into the picture of what the evidence is going to be here. Doctors Greskovick and Stalnaker -- Dr. Stalnaker is what's called an QB/GYN obstetrician. gynecologist, practicing in Pensacola,

Florida. He is a surgeon, American Cancer Society member, and he will tell you what he is. Dr. Greskovick, also in Pensacola, Florida. He is an oral surgeon. He operates on the jaw, the mouth, the teeth. He is a DDS, not an MD as the judge told you. They want to build a hospital. Hospital facilities in Pensacola, Florida, were inadequate. The doctors could not get time. There was a need for a hospital. The doctors weren't just doing it because they were socially minded solely, they wanted to make a hospital, make it a successful hospital and make some money on it. Neither one of the doctors is really in the hospital building business. They are surgeons. But what do they do? They hire an attorney, a businessman's type attorney who is hired to assist them in getting this hospital idea going. You will hear about some inquiries which were made, certain permits which were received, certain plans that were made, architects hired, hospital operators lined up, appraisals done. You will hear a lot. Then after they have done some preliminary work, then it is time to try to get some financing, some construction financing. What is done, as you will hear, is that people will look for some financing by themselves and they will also sometimes hire a mortgage broker. I think the judge indicated one witness might be a mortgage broker. What is a mortgage broker? It is a term I

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probably should have talked about before. A mortgage broker is a person, much like a real estate broker, who has -- you go to him and -- I would like to buy a house. With a mortgage broker, you go to him and you say," I would like to borrow some money." He says," I will send you around." It is just the way a real estate broker would do. He deals with people who like to lend money, who do it for a business, and he sends them around. Well, one of the mortgage brokers that Mr. Crowe, another name the judge mentioned. Mr. Crowe was the attorney hired by the doctors. He was the attorney hired to help them. One of the mortgage brokers ultimately introduces the doctors and their corporation and Mr. Crowe to LFRECC and certain negotiations started. LFRECC is interested in talking about it, our doctors are certainly interested in borrowing the money. A couple of offers go back and forth. LFRECC says, "We will lend you the money if" on the following conditions. They are not acceptable. Some of them are and some of them are not. Our people send back a letter "We will borrow the money if" and a number of conditions, some acceptable, some not acceptable.

Then in December of 1973 it looks like it is pretty close. The doctors have sent the bank $20,000 to review the application. They sent them a bunch of appraisal

reports and feasibility studies. A feasibility study is someone who sort of estimates whether this project makes any sense. They sent him statements about all the doctors. By the way, in addition to the two doctors who are the plaintiffs here, they had agreements with ten other doctors in the Pensacola area who wanted to participate in the hospital. They sent them the information on the ten doctors and they sent them financial statements on the doctors and a whole bunch of other things, and you will hear about it. They really wanted the money before the end of 1973. It is important to them for tax reasons to get started. Mostly for tax reasons. Doctors -- it is too complicated and you will hear it on the stand. They want the money. They are told that the loan must be approved, there is no question about this, they are told it must be approved by LFREC's loan screening committee. Apparently you will hear it is a number of people who are not really employees of the company, but they come and sit and they pass on, they decide whether to go forward with the loan or not. They are told that a meeting is supposed to be in the middle of December, December 17th, I think. It is a Monday, I think. On December 14th, the day before -- actually it is the weekend before. It is the Friday before a Monday. Mr. Crowe then calls up Mr. Pollitt. Mr. Pollitt is the gentleman at the

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bank, sitting in the courtroom -- they are all sitting in the courtroom. Mr. Pollitt is the second man off to the left side. You will hear testimony that he says the meeting has been cancelled. "I am terribly sorry," Mr. Crowe says, "it is so important that we finish this by the end of the year. Isn't there anything that can be done?" "I will see."

A few days later Mr. Crowe receives a call from Mr. Pollitt, who says "Your loan has been approved. There hasn't been a formal meeting, but I have received approval." Mr. Crowe is jubilant. "What shall we do, what shall we do?" He says "come on up to New York" -- they are in Florida, Pensacola. "Have Dr. Stalnaker come, or either one of them, it doesn't matter, have one of them come if possible, because the loan is going to be by the corporation, Greskovick and Stalnaker, G & S Development Corporation and you are the president, Mr. Stalnaker, you sign the loan. Have one of the doctors come. "Christmas is coming and he said "why don't you come a day or two after Christmas." The 27th of December at 1 o'clock in the afternoon Mr. Crowe and Dr. Stalnaker go to LFRECC's office. In LFRECC's office they are handed certain papers. The paper is the commitment. There are two commitments there, one for a construction loan and one for a permanent loan. We will talk about that on the stand a little bit, you will hear about that. But there is

also something in the commitment that says subject to approval. Now, Mr. Crowe reads that and says "What do you mean subject to approval? You told me the loan had been approved." He said "Oh, it's been approved, but until we get a formal meeting we must keep this in here. There is no problem, it's been approved." They go over some other terms and Dr. Stalnaker and Mr. Crowe are there and the document is signed by Mr. Crowe on behalf of the corporation. $180,000 is shipped, actually sent by wire to the bank, $180,000 of the doctors' money, of the corporation's money as its commitment fee, its fee to commit to make this loan. Mr. Crowe and Dr. Stalnaker says "Look, it's impossible to close this loan, to finalize all the details that have to be finalized, to get the money actually by the end of the year. We are really dearly in need of this money. We have to pay some people off who have already started working for us. We need it to do it, so the people will continue working for us. They already started construction. They had to. In Florida law, with a special permit, they had to start construction. They said "Can you give us a first advance on the loan? Mr. Pollitt said "No, we can't give you a first advance. We only loan money when it is finished," but ultimately he said, "Borrow it somewhere else. You are important doctors in Pensacola, borrow it in Pensacola."

JUROR NO. 2: She is sick.

MR. TARGOFF: Is she very ill?

JUROR NO. 2: That's what she said.

THE COURT: That is juror number 3. Let's take care of her. A short recess.

(Recess)

(In open court)

THE COURT: How are you feeling?

JUROR NO. 3: Better. I think it was the Chinese lunch and the heat.

THE COURT: Yes. It was a little warm in here. We are trying to remedy that by getting more air.

JUROR NO. 3: Thank you. Sorry for the interruption.

THE COURT: Please any of you, as soon as you feel a little uncomfortable, don't hesitate to raise your hand and I will try to remedy whatever it is. We are glad you are still with us. Just take good care of yourself. We won't be here much longer for the day. You just go on home and get a good night's rest. All right, counselor.

MR. TARGOFF: Like yesterday's episode, he came in and he said, "I would like a first advance." And he said "I can't give you a first advance. Go back to Pensacola, Florida, you are doctors down there and some bank will give you a loan advance. In response he said "We came to New York

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to get the money. Can't you give us a loan to get the money?" He said, "Well, I will make a phone call." He calls up someone and he says "I have two doctors here. We entered into a commitment letter. It hasn't been approved. Will you lend them money until the closing?" He sends you off. You are driven to a bank, this time NBW. Sister corporation, both owned by the same corporation. The stock is owned by the same corporation. He is introduced to a Mr. Kuhn, another name the judge read to you. "How do you do, gentlemen? Whan can I do for you?" "I believe Mr. Pollitt spoke to you. We are interested in a first advance and he said we can get a loan from you." He said, "How long do you need the load?" "Well, we need the loan until 15 or 30 days when the other loan is going to close." He said, "How much do you need?" "Well, we figured it out with Mr. Pollitt that $300,000 would be a fair amount." "$300,000" he said, "what do you have? Let me see this," and he handed the commitment letters. Sure enough the commitment letter still says "Subject to the approval of the loan committee." He said, "I better call up." He calls up Mr. Pollitt and he talks to Mr. Pollitt. "I have these gentlemen here who want $300,000." He gets off the phone. "Well, Mr. Pollitt says your loan is approved, but I want to talk to Mr. Corcoran," his boss. "Okay. We just need the money. We need it before the year ends. It is

December 27th. We need it before the year ends." He says "Well, if Mr. Corcoran approves it we will give you the loan." You sign a note, $300,000. How much time? 15, 30 days. "Better not make it 15, 30 days, because if the loan doesn't close you are not going to pay me off and you told me you can't pay me off until the loan closes. You better make it 60 days just in case something happens." Okay. 60 days. Are you Dr. Greskovick? No," Mr. Crowe says," I am Richard Crowe. Where is Dr. Greskovick? You expect me to lend $300,000, where is he? He is not here. He is out of the country. We didn't need him. We were told he wasn't necessary, but I can sign for Mr. Greskovick because I have got power of attorney." Power of attorney is something that lets someone else sign for you. Mr. Crowe signs for Mr. Greskovick, Mr. Stalnaker signs. The doctors guarantee the note. They guarantee the payment. They are here and actually they are being sued, sued in this case by the bank who wants the $300,000. They don't even want to get it from the corporation, they want them to pay it.

Okay, they can't get the money that day, so they leave and there are some complications. Someone forgets to sign something and Dr. Stalnaker has to fly back from Chicago, he is met at the airport, he signs it again, it is driven up to the bank by Mr. Crowe and finally before the

year ends they do indeed get $300,000 -- almost $300,000. The bank takes interest off first. They get $300,000 less the interest and they go back. Everything as far as they are concerned is all set. There are telephone calls. Go ahead, we got the loan. Go forward with the construction, finish the plans. Do this, do that. We don't need that other bank any more. Cancel them. January 15th comes, the date that the minutes were supposed to be entered the loan had been approved, the committee meets and they approve it, but not quite. They say approval if you get take-out mortgage. What do they mean by take-out? It is another term. Stand by, permanent. They want to know who is going to pay us when we are finished constructing. You do that, they say, LFRECC its committee says, we approve it, but only if a new -- that if wasn't there before. It wasn't there when Mr. Pollitt told them. It was never told to them before. They get a phone call from Mr. Pollitt."Sorry, but the committee wants a take-out loan. It is approved,but you must get a take-out loan. What do you mean, must get a take-out? We had a loan. You told us it was approved. Everything was okay. The reports and everything were done, but all of a sudden a take-out." Mr. Pollitt says,"it is my business to get take-outs. I will help you. No problem. You will get it, you'll get it."

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He said, what can I do, I will try to get it. 50, a hundred people you call to try to get it. You send some commitments, people willing to commit and you send them to Pollitt. They are not good enough for him. They are not good enough to submit. They are just not good enough. His attorney doesn't like this one, his bank is too small. He just doesn't like it. In the meantime you say to him, "look, that $180,000 I gave you, why don't you put it -- I mean, do something with it. Put it in a bank account that can earn some interest. If we have to pay back the $300,000 and you have 100,000 of ours, put it in an interest bearing account so we will earn interest on the $180,000. Sorry, we can't do that." In the meantime interest is piling up on the $300,000 note. Mr. Crowe and the doctors are flying all over the place in essence, almost, trying to get someone else to be a standby, to be a permanent mortgage lender. They can't do it. They just can't do it. Another month passes and it is getting close to March 1st. Now, remember this loan was 60 days. Remember Mr. Kuhn said 60 days. 30 days from February to March. March 1st the loan is supposedly due. "What are we going to do? We told you we didn't have the money unless we got the construction loan money." He said, "well" -- Mr. Pollitt says, "I can get them to extend the loan and I know we are going to get a mortgage for you. Why

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don't you pay $50,000 on the $300,000 that you owe, to show them that you are in good faith, and give them mortgages, give them a loan" -- new terms. The bank wants a piece of that land you have down there, NBW, because it now has a $300,000 loan, two doctors it never heard of and things are falling apart, let's face it. He says "Well, I don't have $50,000 to give you." He said, "if you want to, transfer the 50,000 out of that 180 that I gave you and send me a mortgage; if you will help me do that I will let you do that." He says, fine, that's a good idea." He takes 50,000 -- the 180,000 that wouldn't be put in interest to help us, but it is 50,000 that can go to the bank. We get credited $50,000 -- it gets credited on that loan and a mortgage is supposed to be sent down for us to sign. Now, there is some delay. Something happened. It doesn't get sent down for a month or so, you will hear about that, and ultimately it was never signed, but just to put the icing on the cake a little bit Mr. Pollitt has said he was going to help find the permanent mortgage. He was going to help them out. He wants $150,000 if he is able to find a permanent mortgage. There is no choice, we say "all right, Mr. Pollitt, you find us a permanent mortgage or another mortgage, a stand by mortgage that will satisfy your loan committee and we will give you that money." Nothing is ever found. Nothing is ever

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accomplished. We are here today. What happened to the project? Initially we sued to try to make them give us the loan because we wanted to build this hospital. It is too late. The hospital is gone. The permit, that special permit that I told you about, it's gone. It can never ever be revived. It was a special quirk in the law. You will hear it called a grandfather clause. You will hear the testimony, but it's gone. The hospital has been abandoned. The architect is suing, the builders are suing, everybody is suing. You will hear a litany, a laundry list of claims made against the doctors' earnings, expenses they have paid. So we are suing here for some damages. We say it is your fault. You did us wrong. You breached this contract. They of course say they didn't and it is for the court and for the jury to find out, to tell us. We also want our money back. We say give us back our money at least. The bank doesn't want any part of that. The bank also -- do you remember the loan that NBW had, the $50,000 loan, 50,000 of our money went to pay it off, when things got hot, NBW says,"oh, no, LFRECC, this loan, we did this because of you. This was supposed to be paid back out of a mortgage, a construction mortgage. You pay us the money LFRECC. So LFRECC writes them a check and happily pays them the money and now LFRECC wants to keep our money, whatever is left of our

$180,000, it doesn't want to pay us any damages and to boot it now wants us to pay them whatever is left on the loan. We are here to seek your help. Thank you.

MR. O'KEEFE: Your Honor, I have a motion to be made in the absence of the jury.

THE COURT: Surely. Will you take the jury, Mr. Clerk, for just a short time. This won't take long.

(Jury not present)

THE COURT: Yes, counselor.

MR. O'KEEFE: Your Honor, defendants move on the opening statement of plaintiffs' counsel, on the pleadings, the interrogatories, the examinations before trial, everything on file in this court and all the prior proceedings had herein to dismiss the complaint on the ground that the plaintiff has by his own opening indicated without any doubt that the plaintiff cannot state a cause of action in this lawsuit. There is obviously a failure of condition precedent to any contract. There is obviously an inability of the plaintiff to prove any variations on the terms of a written contract because of the established provisions of the parol evidence rule and as has been very clear to me that the Statute of Frauds will prohibit his trying to alter or in any way modify the written contract between the parties. These points are covered I think at some length ir our trial

memorandum which I submitted to your Honor. I won't belabor the record other than to put this motion on.

THE COURT: Mr. Targoff, would you care to say anything on the record?

MR. TARGOFF: Certainly, your Honor. I would state that I have, number 1, nowhere said that I would be telling the jury all of my evidence. Number 2, I am not attempting to alter the terms of a contract.

THE COURT: If I regarded the motion as clearly without any basis at all I wouldn't hesitate for a moment to deny it. I have read the memoranda. There are very vital questions that may be resolved against the plaintiff and on the other hand may be supportive of the plaintiffs' position. At any rate, my course is quite clear. Decision reserved. Bring in the jury.

(Jury present)

THE COURT: Won't you please proceed with your opening.

MR. O'KEEFE: Thank you, may it please your Honor, my brother Mr. Targoff, Miss Mueller, Mr. Redis, ladies and gentlemen. My name is Raymond O'Keefe. I represent the National Bank of Westchester and the Lincoln First Real Estate Credit Corporation. You have listened to Mr. Targoff and you must be able to gather that what we are talking about

here is a commercial case. This is not a dramatic type of case. It is not Perry Mason for sure, it is commerce. It is people borrowing money and people lending money. As you might expect, in that type situation, everything that happens is documented. This is not the kind of a case where the man is charged with the crime and says I wasn't there and someone says you were. And that's the question you have to decide. That type of case depends on what the witness has seen, what the witness has heard, what the conversations were, and as to that reasonable people do differ. People hear things differently, they see things differently. This case is different in one sense, and maybe for your purposes, being a jury, it is easier. Everything is documented here. Everything is on paper. There were conversations back and forth between these people, between the bank, between the doctors, between the doctors' attorneys and the bank, between the mortgage brokers and the bank, but those conversations ultimately reflected themselves into documents, long letters. As you might imagine, when dealing here with six million dollars, $300,000, it is a lot of money. In that kind of a business situation no one, no business or company, especially banks, does anything like that without lots of paper, lots of paper. Maybe the language isn't as clear as it may be, lawyers

draft those papers, but everybody in this case has a lawyer. The doctors had a lawyer then and they have a lawyer now. The banks have lawyers. So what you are going to hear is really not as dramatic, I don't think, as Mr. Targoff's scenario to you. It is probably not even as simple as that. Mr. Targoff told you when he began his opening, and it is true, and I tell you now, that nothing I say to you is evidence in this case. I am not a witness. I don't know what happened here, other than I know what I am told, and I know what the papers show, and you will see all these documents. They will be given to you. You will examine them. I don't present evidence. The evidence you hear will come from someone sitting in that chair right behind the court reporter. After an oath is taken, questions will be asked and the witness will tell you, will give you his recollection of these events. So anything I say is not evidence and anything Mr. Targoff says is not evidence. I hope, though, that you will hold both Mr. Targoff and hold me to what we tell you. You should remember what we are saying, about what this case involves and what we are going to show you, because I will come back to you in a few days and we will sum up in this case and I will show you by paper, by pieces of paper with signatures, and the signatures of witnesses, the witnesses that you have heard, and the people that you

have seen, you will see these pieces of paper, you will see their signatures and at the end of this case I will show you from document to document to document to document where these people from Florida and their attorney came into a Westchester bank with a scheme to build a hospital in Florida, walked away with $300,000, $250,000 of which is still owed, as Mr. Targoff has explained to you, together with interest and all of that stuff that banks charge. Now, I am not going to show you this through the recollection of witness A or witness B, although we will have our witnesses, but when this case is over you will be able to see and take with you in that jury box and into that jury room a clear documented case. It involves no great debate skill on my part. I don't have to invoke your sense of patriotism or anything else. I do, as lawyers have to do, give you evidence, and I mean real evidence; evidence in the sense of document after document. You can argue always -- people can argue "I didn't say it." Or "I was misunderstood." That's all right. When you sit in that jury box, as you do, you bring into that jury box all of your experience. This is not a vacuum you are in. You just weren't born yesterday morning and placed into a jury box. You all come from different backgrounds. You are teachers and mechanics and retired telephone operators,

administrative assistants, clerks, but you have one great advantage, and that is truly the great glory of the jury system, you, and it is your sole function, and I can't interfere with it, his Honor can't even interfere with it, it is up to you solely and wholly to judge the facts of this case. It is you and you alone who will determine who is telling the truth sitting in that chair. You don't have to forget where you are from or what you have learned in the years that you have been alive. You bring that experience with you. This is a New York jury. No lawyers, no doctors, no ministers, just a New York jury, especially in a case like this where papers are produced. So all I say to you is I make you no promises, but I will bring you at the end of this case the documents that have been received in evidence and we will pile them in front of you one by one by one,which will show a clear trail from the very beginning to the very end. All signed, all witnessed by responsible parties. We are not dealing here, ladies and gentlemen of the jury, with widows and orphans. It is not that kind of a case. We are dealing with the big boys now. We are dealing with doctors and lawyers and banks and we are talking about real estate and buildings on real estate and mortgages. All those terms that Mr. Targoff talked about, I think he explained them pretty well. I knew some of them

before this case, but some of them I have only learned because of my connection with this case. It is not a great mystery, I don't think. Lefrak, my client, one of my clients, Lincoln First Real Estate Credit Corporation. You might realize by that name, it is in the business of giving someone credit who wants to do something with real estate. It is in the construction loan business really. You live in New York and there is a vacant lot and one day someone begins to move on it and then they are clearing the lot and then they start to dig a hole and if it is a big building, it takes a couple of years. But you begin to see it and it takes shape and it begins to be built up. That's what Lefrak does. It starts the construction up. When you have the building up you have a business. That's different. A hospital is a business. The hospital is a business. The business is producing some type of income. So the financing of that changes somewhat from financing raw real estate into a building to continuing a building and the business that's housed in that building. For that type of permanent loan, what Mr. Targoff was talking to you about, you go to a permanent lender, a bank, a savings and loan, that type of thing. Once the building is built you would not expect a construction financing real estate credit corporation to have anything further to do with the building and by then

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they expected to have been paid and out, so they are said to have been taken out of that loan by a permanent financing. Now, there is no point in my telling you at a quarter of 5 on a Monday afternoon in New York who said what to who because really I don't see that that would help you much. It doesn't make any difference what I tell you what Mr. Pollitt said to Mr. Crowe and what Mr. Crowe said to Mr. Pollitt. First of all, I wasn't there and I don't know what they said, but you will hear Mr. Crowe and you will hear Mr. Pollitt. As you sit in that jury box as jurors in a federal case involving a national bank and a real estate credit corporation, your function is to look at those witnesses, bring to break upon them your experience and you will be able to tell, I think, after the witness testifies and is cross-examined, which those of you who have been jurors before know about. You know that the lawyers are not here to pull punches. We are here to make sure that what you get is evidence. Real stuff. Nobody expects you to make a decision based on smoke. You do it on facts. His Honor will tell you what the law is and you must take that direct and I am subject to his Honor as you are. We will lead these witnesses before you; we will ask them questions and they will give us answers, but they will be talking to you becau in the ultimate analysis that's what it is. Now, what I

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think really happened here -- let me just give it to you in a couple of minutes work. There is no doubt, really, that the doctors wanted to build a hospital and they didn't have the money to do it so they came for the money. The papers will show that the papers were given to them, letters, agreements. We will give you the money under these conditions, 1 through 13, 1 through 15. Comply with these conditions and you can pick up the money. If you do not comply with these conditions we will not give you the money. Banks are notorious for being soft hearted. This is what you must do to get the money. When it isn't done they don't get the money. It is that simple. That is one part of the case.

The next part is this $300,000 we were talking about. You see, there are two suits here. The plaintiffs, a doctor and a dentist, are suing because they were not lent six million dollars for a construction loan and permanent financing. The bank is counterclaiming, cross suing, suing them, because they failed to pay a written note signed by one doctor, the other doctor by his attorney who sits here, personally guaranteed by the doctors. We personally guarantee, we promise in writing to pay. We guarantee it. The corporation will pay it. If they don't pay it we will pay it. Here it is. We will sign. Give us the dough. There is no question but they got the money, no

qustion but they signed the guarantees and there is no question but that they haven't paid. So you have two: one is the doctor and the dentist are looking for a loan of money and on the other hand as lawyers are fond of saying the bank is looking to get paid for the note. Now, I suppose I could complicate it for you, if I wanted to, and I don't like to make too much analyses, but I was thinking as Mr. Targoff was talking through, I have in my pocket my registration for the car which I have to renew and I notice that before I get my license or my registration I have to give them the old one, I have to have an inspection, I have to have an insurance ticket, I have to fill out a form and I have to sign my name in three different places. Now, it just won't do for me to go to the Motor Vehicle Department and tell them to give me the registration, that I am not going to sign the paper or I am not going to have the insurance form or I am not going to have the inspection. These are the conditions that I must comply with in order to get the registration of my automobile. That basically is what we are dealing with here, a written agreement of some length which you will see, signed, attested to, witnessed in the presence of an attorney, a solemn thing, a document, delivered back and forth, everyone has copies. This is our deal. Do this and we must do this because we

say so here. Both parties. So the question will come down to, as all lawsuits do, really, were these conditions complied with. I don't want to ever try to impugn bad motives to people in commercial cases. It really isn't necessary. It is sort of cut and dry. So you will see all the papers, all the documents, and I will come to you at the end of this case and ask you where is the pretty picture that Mr. Targoff painted in view of all of these papers. Now, what do the plaintiffs want in this lawsuit? I really don't know. Mr. Targoff will tell you that as he goes along and at the end he will say what he wants, what his clients want. What his clients want I can tell you. They want, first of all, you to make a finding that they have lived up to their obligation as reflected in these written documents that they have complied to the letter with what they said in writing they would do. That's the first thing. The second thing is they want you to say, and to make your judgment, as a matter of fact, that the doctors have to pay back the balance of the $300,000 that they left with, which is $250,000 with some interest. Now, most of us have notes, promissory notes that we sign. I have my famous car and make the payments on it. If I don't make the payments someone is going to take the car. We are going to ask you to require the doctors to live up to that obligation. Mr. Targoff and I

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have confidence in you as a jury that you will listen I am sure to his Honor when he directs you; you will listen more in your province to those witnesses because in truth and in fact you are not only ministers of justice as his Honor pointed out to you, but you are judges equal with his Honor in the area of fact. Nothing I tell you will make you any more important than you are. You are very important people. You are an American jury who are going to determine the witnesses. You represent the community in this area. We can't put ten million American New Yorkers in that jury box, so we take six and say it is a fair representation and I think it is. So listen to his Honor, listen to the witnesses, try to bear with the lawyers when we get lawyering and objecting, please bear with us. We are doing our job and you will do yours, and when you are finished you will know, you will know that you have been on a jury and you will have done your job.

Thank you.

THE COURT: Ladies and gentlemen of the jury, we are going to call a halt to the proceedings today and I direct that everybody be in this courtroom at 10 o'clock on the dot tomorrow morning and that will apply to any time that I say hereafter. I do not come down to court with a liveried chauffeur. I take the subway just like you do and I sometime

arrive at my chambers at 8 o'clock, 8:30. There are other matters as well as this that are going on. One of the things I learned as a boy, and it was a mighty good lesson, I have never broken an appointment because I lived at a time when if you didn't report for your job at the moment that you were supposed to be there you were told by the boss "Go and see the bookkeeper. Get your check and get out of here." Those are the lessons we had to learn. So I shall not keep you waiting and I will not have you keep me waiting. That applies from now until the end of the case. That's it. That's the kind of a judge that came into your lives and you have to put up with him. So tomorrow morning you be here at 10 o'clock and you are specially directed to take care of yourself and that is a general order to all of you because we need you. We don't want anything to interfere. A matter of this kind requires your own personal attention to your own personal needs. We want a free mind and listening to evidence is a very, very weary undertaking. So eat and sleep and do those things that will keep you alert at all times. That's important. Good night, ladies and gentlemen.

(Adjourned to 10 A.M., April 6, 1976.)

TRIAL TRANSCRIPT DATED APRIL 6, 1976
(pp. 165A-247A) 39

Cooper, J.

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G & S DEVELOPMENT CORP.,
et al.

v. 74 Civil 2451

LINCOLN FIRST REAL ESTATE
CREDIT CORP., NATIONAL
BANK OF WESTCHESTER

April 6, 1976
10:00 a.m.

(Trial resumed)

(In open court; jury present)

THE COURT: Good morning, counsel. Good morning, ladies and gentlemen. Thank you for being on time.

Counsel, have you any applications, either side, before the first witness is called?

MR. TARGOFF: None, your Honor.

MR. O'KEEFE: No application for the defendants, your Honor.

THE COURT: My staff and I have worked until the small hours of the morning going over the memoranda again that counsel submitted on points of law. We think it is the better part of wisdom to tell you what our thinking is and what is going on in the judicial noggin and afford you an opportunity to tell us whether we are on the right course or not.

What we have in mind may very well alter the extent of this case. Our concern is primarily with the law relating to admissibility of evidence and if we are right, then it would be idle to receive into evidence that which wouldn't make a particle of difference so far as the law is concerned, and we might very well rule that such evidence would be inadmissible.

Rather than make precise declarations at this juncture, we think it might be better to tell you what our thinking is and give you an opportunity to respond.

These are items with which the jury has no concern. They have to be resolved and they are purely questions of law. I am going to ask the jury to take leave of the Court.

How are you feeling, ma'am?

JUROR NO. 3: Much better, thank you.

THE COURT: Good.

Take a walk. Go out in the fresh air and come back by half-past 11:00. You are excused.

(The jury left the courtroom.)

THE COURT: Please understand how we expect to approach this matter. We are going to tell you what our thinking is on different points and then I will take a recess to give you a chance to collect your thoughts and

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I will listen to your arguments and then make rulings.

I am aware that during the last few minutes counsel for the plaintiffs have filed with us an additional memorandum of law dealing with the introduction of parol evidence. We shall examine that while you are getting ready to respond.

Let's address ourselves to that particular point. That is point number one and there are at least three others. Let's take it slowly and take it one at a time.

We are going to address ourselves to what we understand the law has to say with regard to the admissibility of parol evidence with respect to the all important provision of the agreement which, in unambiguous terms, calls for the approval by the screening committee of LFRECC of the application of the plaintiffs for a loan.

Our thinking amounts to this on that score:

The agreements of December 26, 1973 entered into between the parties were subject to conditions precedent that were never fulfilled. The plaintiff argues that contemporaneously with the execution of these agreements, Mr. Pollitt, senior vice-president of the defendant Lincoln, stated that the condition of the loan requiring executive loan screening approval was either waived, satisfied or deemed a mere formality. Defendant Lincoln argues that this

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evidence is barred by the parole evidence rule.

Where the parties have reduced their agreements to a writing, the parole evidence rules operate to exclude evidence of any prior oral or written agreements or of any contemporaneous oral agreement, when offered to contradict, vary, add to or subtract from the terms of the writing. Thomas v. Scutt, 127 NY 133.

The rule is based upon an assumed intention of the parties evidenced by an apparently complete written contract to place themselves beyond the uncertainties of oral testimony, and the Courts are not disposed to defeat this presumed intention of the parties. The rule is a protection against fraud and perjury, infirmity of memory and the death of witnesses, Thomas v. Scutt, already referred to; "... and while its application may on occasion seem to work injustice,on the whole it works for the good." Fogelson v. Rackfay Construction Company, 300 NY 334, at Page 338.

In the case at bar evidence that Mr. Pollitt stated that the committee approval had been waived or satisfied or was merely a formality is clearly inadmissible since the direct effect of admission of such proof would be to contradict, vary and subtract from the terms of the written December 26th agreements. See Leumi-Financial

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Corporation v. Richter, 17 NY 2d 166, at Pages 172 to 173.

In the Leumi case, the New York Court of Appeals ruled inadmissible parol evidence that a promissory note which contained language on its face indicating that it was a demand note was intended to evidence loan for a minimum of one year.

The Court reasoned, "The rule of law which defeats defendants and makes this summary judgment valid is that which makes parol evidence inadmissible to vary the terms of a written agreement. Acceptance of defendant's version of the transaction could be accomplished only by letting defendant Richter give oral evidence directly contradicting the clear terms of a written agreement."

Here in our case proof of waiver or satisfaction of the condition of committee approval could be achieved only by oral evidence that contradicts the clear terms of the December 26th agreements. It is precisely this pitfall that the rule of parol evidence was designed to prevent. See Richardson on Evidence, Section 601,603, 1973 Edition.

It is clear that where parties enter into a binding contract parol evidence inconsistent with the express condition of the contract is inadmissible. See Fadex Foreign Trading Corporation v. Crown Steel Corporation, 70 NYS 2d 892, First Department.

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The letter agreements of December 1973 clearly express the intentions of the parties on this matter. The alleged oral statement would necessarily negate the written condition. Therefore, any testimony regarding it is inadmissible as a matter of law. Meadowbrook National Bank v. Bzura, 20 App.Div. 2d 287, First Department.

Similarly, since the December 26th agreements are within the provisions of the New York statute of frauds, that is the General Obligations Law, Sections 5-703, and therefore must be in writing, the statute renders invalid and ineffectual an oral agreement changing or modifying the terms of the written agreement. See also General Obligations Law, Section 5-1103.

Accordingly, we believe strongly that the parol evidence rule and the New York statute of frauds render inadmissible oral statements allegedly made by Mr. Pollitt at the signing of the December 26th agreements. We see absolutely nothing gained by taking testimony, short or lengthy, on this point because at the close thereof it would only amount to oral testimony attempting to subtract one of the most important terms of the written agreement between the parties.

Now, I know that you are efficient counsel and I recognize that I don't have to tell you that two and two

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make four, but I want to repeat, I had a choice of either coming out here and making a ruling on that point I have just covered, and saying I shall receive no proof of this nature, because no matter how long it lasted I would have to strike it as a matter of law, and since I would have to strike it what sense is there in taking it in the first place, but I am not doing it that way. I am telling you how the judge is bending and what impresses us, and I invite you to set us aright if we err.

I will take up the other points as soon as we have managed to have them typed out.

Declare a short recess, Mr. Clerk.

THE CLERK: All rise, please.

(Recess)

(In open court; jury not present)

THE COURT: Before you begin, gentlemen, let me make three points.

One, that it is idle and a Pyrrhic victory to just grasp something that seems favorable to you because the judge seems to be inclined to take one position as against another. That's just a temporary victory. It will ultimately be corrected if the Court has erred. Don't fool yourselves about that and don't bother me with things that you are not sure of. These are questions of

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law calling for professional equipment, and not just saying, "Well, it looks good for me. Okay, let's go on to something else."

Why does it look good to you? I want reasons.

And why doesn't it look good to you? I want reasons for that,too.

That goes for all the points that I am going to call your attention to.

The second point is that the Court, of course, will receive into evidence all the written documents, every piece of written material that is in the case.

Thirdly, that there is no need to advance oral arguments that you have already incorporated in your memorandum, which I am going to direct shall be made a part of the trial record, including the supplemental memorandum advancing the estoppel theory that was not at all touched upon in the original papers and is now being advanced, as I see it, for the first time, but, nevertheless, it is before us and we have got to consider it, but I am emphasizing that that, too, shall be made a part of the trial record.

Suppose, Mr. Targoff, you lead off.

MR. TARGOFF: Your Honor, I would like to first state both at Page 20 of our initial memorandum and in our

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requests to charge, specifically request number -- I will get the number in a moment -- the question of estoppel is addressed. I know there is a specific request to charge to the jury to the effect of an estoppel.

Putting that aside, we did receive their trial memorandum the same day we filed our trial memorandum. The reliance on their points, those that are addressed, and the statements that your Honor has made required, in my judgment, that we submit another memorandum on this point which I think is a crucial point for our side.

I want to make one thing as clear as I can, and that is, we do not seek to change, modify or vary the terms. I know that's easier to say than it is to show what we are doing. Obviously, anyone who is trying to avoid the parole evidence rule will say the same thing, but I think the case that I cited to you in the brief submitted this morning bears some careful attention, and particularly what Judge Cardozo had to say, because what he says is when someone claims estoppel it doesn't prevent the other party from withdrawing his representation at any time and going back to the contract. It doesn't change the contract.

Now, that's what we are saying here. We are saying that all the elements of estoppel are here, and I assume that I do not have to address the fact that we can, assuming

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the Court rules that the evidence is admissible, that the elements of estoppel, our representation, indeed the only way we can prove representation, if we are allowed to, is through oral testimony, reliance and lack of knowledge on our part of the falsity of the representation. If we are entitled at all to put this evidence in, certainly we would be entitled to put in evidence on all the elements. I don't think there is any dispute about that anywhere.

The question is, can we say on the stand that contemporaneous with the signing of the letters we were told that the loan has been approved, it's merely the requirement of the meeting. Now, I say that we can do that because it is a representation of the fact; we relied on it and we did not know to the contrary. We are not changing the contract. The contract said approval. We relied on that fact in a lot of ways, the most important of which is to borrow $300,000 and spend it, all before we hear on January 15th, "Sorry, we take back our representation."

Now, it seems to me -- and if I could, your Honor, and rather than myself read a page or two, I don't want to burden you with that, I will, if you like, but I think if the record be deemed to reflect that I call your attention to Page 456, et seq., of the opinion of Judge

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Cardozo in the Imperator Realty case. That's at 228 NY.

I think I will, if you don't mind, read a few words.

THE COURT: Do what you think you ought to.

MR. TARGOFF: It states, "The contract therefore stood unchanged."

This is a case where the testimony came in and at the time of the closing of a contract, that one of the parties said there is a written condition in the contract that says at the closing all liens, encumberances, everything has to be clean. The testimony was sought to be introduced that said, "You don't have to do that." The trial court let it in. The appellate division reverses and says parole evidence, statute of frauds, everything said here; and Judge Cardozo says it comes in, but not because it changes the contract. The contract therefore stood unchanged. The defendant might have retracted his oral promise an hour after making it and the plaintiff would be helpless. He might have retracted a week before the closing and if a reasonable time remained within which to remove the violations, the plaintiff would still have been helpless.

Again, talking about was there harm: Is the law going to permit the promissor, even in the face of a written

contract, to withdraw his promise. If there is harm, no. If there is no harm, yes. The contract doesn't change. He gives an example. It's in our brief and I won't say it. It's the wallpaper. Someone contracts to do wallpaper. There is a written contract. The contract says you put new wallpaper in. Contemporaneously, he says, "Don't bother." Now, can that "don't bother" be introduced? Cardozo says yes. Not because you are changing the contract, because if someone represents something and you rely on it, you cannot go back on that representation if there has been detriment. That's what we say here.

Now, I think really the analogy that I know that occurs all the time is really similar, and that is fraud in the inducment of a contract.

In New York, which is the strictest state, from prior experience that I can recall, in allowing such testimony in, even if you have a contract that says all warranties are contained herein, the question is can someone say they have been induced into a contract by a representation not contained in the contract? Well, the law in New York says you have to be magical in your words to keep that out. You have to say that there is no representation warranted, nothing is contained here. It has to be the most magically worded clause that we learned

in law school.

Most states let it in in any case, but the theory is the same thing. You can't make a fraudulent statement in advance of a contract and then hide behind the terms.

Here we are not talking about a fraudulent statement. Mr. Pollitt, we believe, was told that it was approved, but the theory is the same. Can he say it's been approved? Can we rely on it in good faith, not knowing anything better, and are we estopped ourselves from proving that? Does it have no effect whatsoever? We are not changing the contract.

Now, there is another case, New York Conference Association of Seventh Day Adventists of Syracuse v. 915 James Street Associates, Limited, 33 App.Div. 2d 235, Fourth Department (1972). This case was a sale of property case -- again, a statute of frauds type case, a parole evidence type case, and there was a claim -- well, I will read it.

"Plaintiff urges that the parole evidence rule would admit proof of the oral agreement of plaintiff to insure during its occupancy of the building on the premises which it is claimed was contemporaneous with the execution of the contract." Contemporaneous; not

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afterwards. Not a contract modifying it; contemporaneous oral representation, a promise.

The Court, citing Imperial Realty, and quoting it, citing Ralston, to the effect as follows:

"The law is clear that in any case where a party to a contract agrees to give up a possible further defense or forgoes the advantage of a condition provided for his benefit in an existing contract, the promise is binding if the promisee relying thereon changes his position."

Now we all know if you are changing the contract you don't have to rely on anything. If you have changed the contract it's there, it's changed, but why are these cases talking about reliances? Becuase it's not a change of the contract. It's a separate equitable doctrine.

These cases are all cases subject to the statute of frauds, subject to the parole evidence rule. There is no question about that.

Now, what about their cases and the ones your Honor cited? We don't quarrel with the law there. You can't say that if you sign a note that says it's a demand note, you go into court and you say, "No, no, it's a one-year note." Nothing could be more evident. However, I do maintain that if he said he promised me that he would not demand it for a year, and banks do it

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all the time when you go get personal loans, they tell you it's a demand note, "we promise you."

Now, they can withdraw that promise. He can call you up and say, "I'm sorry, but we are going to demand it," and if you haven't relied on it to your detriment they can do it, but if you have relied on it to your detriment, they are prohibited from withdrawing that representation. They are estopped. The contract hasn't been changed, but they are estopped.

Now, your Honor, I am not fully familiar with the facts of all the cases that you cited this morning to us, but I believe it will be borne out, if they are looked at, that in none of the cases was there a representation relied upon to the detriment, but in each case was an attempt to say the contract doesn't say what it says, it says something different.

Now, I think that suffices on one aspect, but I believe there is another reason. Even if I am wrong about that, and that is, it seems to me there is a dispute here about what the word "approval" meant. The word is clear. Everybody knows what "approval" means, but there is a dispute here whether that word, given the negotiations of the parties, had another meaning.

Now, it seems to me that again there is some

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black letter law we are all familiar with, that ambiguities in a contract are all subject to parole evidence, clear terms are not subject to parole evidence.

So the question is, is the term "approval" here clear or is it ambiguous? How do we determine that? Well, the cases say look at the plain meaning. Certainly, the plain meaning of this word is clear, "approval," but if, for some other reason, the parties in their negotiations or in their dealings have created an ambiguity in the word, then parole evidence is permitted.

Well, here it seems to me we are entitled, and it's a question of fact, to determine whether there is such an ambiguity. What is "approval"? It doesn't say written approval. There is no claim that it says written approval. It says "approval." Could the approval be given orally? Mr. Pollitt in his deposition said yes. Why can't we show that? Why can't we show that that term "approval" was a term in the contemplation of the parties that at the time they entered the contract could mean oral or written?

Now, it seems to me that yet there is another -- let me just regress a moment.

It happens a lot in cases, I think, where there is a term that has a special meaning between the parties, a trade term or something of that nature. It might be

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clear to everyone else, but if it has a special meaning between the parties it's ambiguous, it may be ambiguous. You may have parole evidence as to it. You don't have to be in a trade to have this special meaning, it seems to me.

All that the law is saying is that, if you have proof, if there is a fair question of fact as to whether that word did have a special meaning, that question of fact must be resolved by the finder. In other words, I am saying that to get to the question of whether "approval" is ambiguous, there is a prior question of fact, and that should be resolved over here.

Now, one last point, I think, as to why we are entitled to get this in. The contract, assuming I am wrong on both the others, the contract says, subject to approval of the loan screening committee. How does one show the approval? How do we ever show that we did get approval? Do we need a signed writing? No cases cited by the gentlemen, no case that I am aware of says that in proof of satisfaction of a condition to a contract must there be a signed writing. The proof that we intend to introduce goes to that as well. What was said both before they signed the contract, after they signed the contract when he called Mr. Kuhn up and thereafter

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demonstrates satisfaction of the condition?

Now, they may say that the condition could not be satisfied until the formal approval of the committee in a meeting, in a technical meeting. It's a question of fact as to whether the condition could be satisfied before then or afterwards.

Now, your Honor is going to raise other additional points and much of what I could continue on is why this evidence could come in on additional theories in the case, such as, if I may just perhaps telescope it a bit, there was an approval here, even in the formal meeting. There is no dispute about that. There is an approval putting in a new condition, a new "if."

The loan screening committee minutes say, "The loan is approved, but you have got to get a takeout."

Now, all the evidence must come in to show whose responsibility it was to get a takeout. There is nothing in the contract which says whose responsibility it was to get a takeout, because the contract didn't say there was a need to get a takeout. They changed the contract on us. All the testimony must come in to go to that issue, for certainly there is no dispute again that if the obligation was in there, in whole or in part, to get a takeout and that was a primary condition, a first con-

dition which had to be satisfied before a closing, their breach permits us to not to have to prove that we performed the contract, or other conditions.

There are a number of cases on that cited, but we must be able to show whose responsibility. All these facts come into the relationship between the parties to show whose responsibility.

Then again, on the other issue, they are suing to get the $300,000 loan back. They have got a note, the contract between the bank and the doctors, the note. It was actually between the bank and the corporation and guaranteed by the doctors, but it's a note. That note doesn't say anything about loan screening committee approval, but there is a whole history -- and you heard me in the opening statement about that. What was said in that meeting with Mr. Kuhn relating back to what Mr. Pollitt said.

Now, certainly there is no case that I have seen anywhere which suggests that you cannot use the doctrine of equitable estoppel as a defense to another party's claim. I may have been anticipating and I will await to hear what your Honor has to say about that and go into more detail on it after.

THE COURT: No, don't do it that way. I have

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given you an opportunity to exhaust yourself. If you have anything to say, say it now.

MR. TARGOFF: You said there were four points.

THE COURT: You mentioned different points. Go ahead.

What other points do you want to call my attention to? And while you are at it, since I have had to interrupt you to straighten out your thinking, explain this to me:

Do you think the law countenances this sort of approach by an applicant for a loan of $6 million, that that power to give it should reside in any officer? From time immemorial the practice has been "We have your application," says the officer, "It looks good to us, but the final approval on so substantial an application must be with a screening group or committee of the board. They will have to have all the material laid out before them, and my function is to help gather all the material that you want for their consideration."

You say that, despite that clear condition incorporated into the writing, Mr. Pollitt or anybody else, and you can prove it by oral testimony, said in effect to the plaintiffs, "Don't be concerned about that. That's all set."

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MR. TARGOFF: No.

THE COURT: "It's been approved."

MR. TARGOFF: Yes. The difference is, if I may -- I'm sorry, I didn't know if you were finished.

THE COURT: I wasn't, but that's all right. You have enough of my point. Go ahead.

MR. TARGOFF: It seems to me there is a fine distinction between what you said, and I agree with you. I don't think it would be reasonable -- I think it might be a question of fact.

I myself don't think it would be reasonable that Mr. Pollitt by himself could sign a note for $6 million, but it might be a question of fact.

The jurors might find, with the arguments of counsel, that it was insane to think that Mr. Pollitt could grant that loan, but it seems to me that I might be able to get that to be a question of fact, but it seems to me that if Mr. Pollitt, the senior vice-president, signed by another one, and Mr. Corcoran the next day affirms that it has been approved, that doesn't mean that Mr. Pollitt said he did it himself. He said it has been approved by those gentlemen, by the loan screening committee.

So it's different than saying we don't need loan screening committee approval, that would modify the

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contract. So that's what I am saying, and I still think that.

Your Honor said something else that I think is important here, and that is that the case really -- there were a number of conditions in this document that had to be fulfilled before a loan could go out, and I am sure my brother is going to argue that the bank had -- their architect had to approve the plans. This bank wasn't locked into a $6 million loan, but what we are saying is they couldn't act in bad faith, they couldn't misrepresent, and if they did misrepresent we are entitled to prove through oral testimony, and if we rely to our detriment we are entitled to recover our damages.

We have given up our claim for specific performance. We know we can't get that. We know because of the prior events here, the conditions that they had to yet do, they had to do, the bank. The bank's architect had to approve the architect's plans. We can't prove the bank's architect ever did that. We can't get specific performance here, we have given that up, but what we are saying is that they have misrepresented to us.

THE COURT: Forgive me for interrupting you, but do the pleadings include the charge of misrepresentation? You can just say yes or no.

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MR. TARGOFF: They were intended to. If I may have a minute, I will call your attention to the paragraph.

(Pause)

Paragragh 14:

On or about December 14, 1973, Pollitt, on behalf of Lincoln (a) advised Crowe and Stalnaker that the aforesaid condition had been satisfied."

There it is.

THE COURT: Not in my book. You can't tell me that that is the equivalent of saying "you misrepresented, Mister." If that's the case, you say it and you charge it.

MR. TARGOFF: Your Honor, we didn't bring a case for fraud here. When we filed this complaint we hadn't seen the minutes. All we knew was that Mr. Pollitt told us that the thing had been approved, it had been satisfied.

THE COURT: But up to this moment there has never been an amendment, there has never been a change in the pleadings to incorporate the charge that they misrepresented. Now you are saying that that's what you want to prove.

MR. TARGOFF: Yes, your Honor. I am saying that he told us -- I don't think I was required to plead my evidence in the complaint. They never sought an

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interrogatory to find out all the facts of what we claim was said; they never took a deposition. They went pell-mell into the theory which you are apparently agreeing with, and it's being borne out, that all there was was a piece of paper that we signed, a note.

Now, I don't think in the light of their failure to seek discovery where they can say they have been detrimented by the fact that I pled something and it turns out -- a representation, not calling it a representation, if I had pled a representation without giving the specifics they would have moved to say, "Give me the specific representation."

I certainly don't think that the case at this point should be thrown out because of a pleading matter of this kind at this point. Pleadings can be changed after trial, after judgment. There has been no claim of detriment by the parties because of this.

Indeed, your Honor, in the second request to charge which was given to them, and I certainly haven't seen any claim that the trial should not go forward, there should be a delay on behalf of the defendants.

We state the facts involve a principle of law called estoppel. The law of New York says that you may find an estoppel based upon word or deed of one party which induced

another to rely upon the representation.

They didn't come into court requesting an adjournment saying mistake, confusion, "we were surprised by this." If they had, your Honor would have considered their application and we would have discussed whether they have been forewarned in some negotiation between us. It would have been resolved. They haven't claimed prejudice.

THE COURT: Very well. Let me hear from you, Mr. O'Keefe.

MR. O'KEEFE: Do you mind if I speak from this podium, Judge?

THE COURT: Yes. Do anything that makes counsel comfortable.

MR. O'KEEFE: I was following Mr. Targoff along pretty well until he got to the end. I have not yet been served with any requests to charge in this case. I have not seen their requests to charge. They have never been served. Maybe they will be soon.

Now, I don't want to belabor this. I understand your Honor's admonition to me before this argument started. I understand that. I appreciate that. I am under the impression, and have been since I started to practice law, and I am under the impression in this case, that I am trying the legal issues defined by the pleadings,

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amplified in this court by the pretrial order.

The complaint in this action sounds in breach of contract. It seeks as a remedy specific performance of the contract to make a mortgage, and damages for breach of that contract. This is how I characterized this lawsuit. This is how I have understood it since its inception. It is how I understand it now.

Our research, our preparation of the defense of this lawsuit are based upon the pleadings. In my judgment, the facts here were such, based on the law as I understood it, I needed no opportunity to discuss factual items with the plaintiffs because I have always proceeded in this case as an issue of law which would ultimately be decided by this Court.

Now, any issue of law, including this basic issue that we are talking about, and very few things are more basic than parole evidence and the statute of frauds, have to have before your Honor can rule some type of a factual pattern, and in our case we are very fortunate because of the documentation. The letter of commitment is quite clear. It says,"subject to the approval of the loan screening committee."

Now, the only way that the plaintiffs in this case can dent the clear, unambiguous terms of the letter is

to go around that and say, "contemporaneously with the handing of the letter we were told the opposite."

That's the only factual content I think we need here.

I even pass over the fact that at the time that the letter was handed to the plaintiffs, and to their attorney who was with them -- I pass over the fact that they were then represented by counsel, although it's relevant -- initials were put on the paper to show we are changing this term and that. We initialed on parking spaces. I pass over that, although it's there and it's relevant.

The reason for the parole evidence rule is precisely this kind of a case. Each rule of law, as you and I and my brothers understand them, have the rule and the reason behind the rule, and the reason is very simple:

If a written contract is to mean anything, it must mean clearly what it says, or why should we have written contracts? Why do we insist on this? Because as you pointed out to the jury, we know, as attorneys, human behavior. We know that people will come to a written agreement thinking somehow, some way, they will avoid the clear, precise, unambiguous terms of the contract. That's the plaintiff's case here.

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The contract is clear in one way and they say it's not clear. Now, I appreciate Mr. Targoff's attempt to get around this rule. It's a very difficult burden. I wouldn't want it. I wouldn't want to have to make the arguments.

Now, all of the cases that I see, this memorandum which I received this morning dealing with a point of equitable estoppel actually invoked, if I can be frank with you, memories for me. There was a time in my legal career when I taught this subject at the Fordham Law School, and I remember some of these cases. I haven't read them, your Honor. I just got this now. I haven't read them in a long time, but I remember about estoppel and the rule of estoppel, as you know, the rule of equity.

We have had it for two years in this country, and many years before in the courts of chancery. It is to avoid strict legalisms, to provide some type of justice in a situation where a rule of law doesn't merely do fairness to the parties, but to speak of equitable estoppel in a commercial context involving a loan and the construction of a profit center, termed otherwise a hospital, really does not invoke my equitable feelings at all.

The representations which are alleged to be proved here, the elements of estoppel as everybody except

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the ones who had me teach it, remember representation, reliance, damage or detriment. It is the proof of the representation here which flies right in the face of the parole evidence rule. There is no possible way, since the case of Thomas v. Scutt in 1871 or the Leumi case in 1966, and all of the cases in between and before and since, that the evidence of the representation can be admitted by your Honor because it's completely violative of the parole evidence rule.

I am not even talking about the statute of frauds. I am not even there yet.

The whole point of the parole evidence rule is that a man cannot take a written contact which is clear, as this is clear, which is unambiguous, as this is unambiguous, and say to this Court or any Court that "I did not understand what approval meant," when you can go to anybody. Nobody has to be a lawyer to tell you what that word means. We are not talking about hereditaments and pourpresture; we are talking about the English language.

We are not dealing here with an equitable estoppel case of the immigrant who doesn't speak English, and there are those lines of cases. We are talking of two educated persons, one of whom is present by power of attorney, one of whom is present in person, and both of

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whom have with them on this occasion their attorney.

Now the word "approval" can be understood by laymen and laymen of an uneducated level.

Now, I understand Mr. Targoff's desperate attempt to circumvent the rule. I appreciate it. As a matter of professional competency I really do appreciate it. I like to see, and so do you, good lawyers work. But I don't want this Court or any Court, for that matter, just for the purposes of this case, to go into any error, and it seems to me that indication you have given is thoroughly supported by the cases you have cited. I again urge it on you.

Now, Mr. Targoff makes reference to the fact that he doesn't know what "approval" means, whether it should be written approval or nonwritten approval. In his file, given to him by my office, in my file and soon in evidence before your Honor are the minutes of the loan screening committee held on the 15th day of January, 1974 in formal committee, recorded by a secretary, at which five different loans were presented to this committee. I think two were approved and three were disapproved, or perhaps one went on the shelf. This particular loan was approved subject to a permanent mortgage by a financially responsible institution acceptable to LFRECC. It is all recorded in

the minutes.

When the committee met, the evidence will show they were notified. Mr. Crowe was skiing, they couldn't find him. They called the mortgage broker. They called Pensacola. We have the telephone records and they have this and that. I don't want to get into that, but I am surprised when Mr. Targoff makes an argument which, based on his preparation of this case, should clearly indicate to him has no basis either in fact -- now, I don't mind, and I never do. I always appreciate an argument of law, but I think if it's in your file you might as well live with it. This is part of the tools we have in the trial of this case.

Now, there is not in any of these pleadings -- when this started, when I went out and sat on that table and Mr. Redis brought me out the complaint, I said I have to see the pleadings because I don't think there is an issue of fraud in this case, and if there is I think I am in a little trouble.

MR. TARGOFF: No issue of fraud is claimed, your Honor.

MR. O'KEEFE: I am going to forget that. I didn't know until just now that there was no claim for specific performance here, because that's in the complaint,

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that's in the pretrial order, and even I know that you have not the power to specifically perform a contract to lend money, because how are you going to enforce it? How can you do that, even with all your equity jurisdiction? You can't compel me to lend money to someone. You can compel me to pay damages for not lending it, when I promise to lend it, but you can't make me lend it, any more than you can make me build a building or enjoin me in the affirmative way. It just isn't within your competency.

Now, I could go further, and I am going to go further, because I have only spoken to you now so far of the parole evidence rule. Now let me turn to a statute of the State of New York which is binding on you as you now sit under the Erie jurisdiction, Section 5-703 of the general obligations law which lawyers of my generation and yours remember simply as the statute of frauds.

The contract to give a mortgage is, under the law of the State of New York, a contract within the statute of frauds. As such, the statute is clear, is unambiguous. The statute itself is as clear and unambiguous as the contract in this case and we cite it to you in our memorandum of law which you have before you, and I will try to read it as best I can.

It says, "An estate or interest in real property other than a lease for a term not exceeding one year, or any trust or power over or concerning real property, or in any manner related thereto, cannot be related, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

Now, the statute of frauds has been with us lawyers for many, many, many years. Every court of every type and description has had a crack at the statute of frauds. Like any other subject in the law of the State of New York, Judge Cardozo has dealt with it and has dealt with it as a master, and in Sleet v. Sampson, if my memory still serves me, he was very clear that a contract to create a mortgage, to give a mortgage is within the statute.

Now, of course, there is a reason for the statute of frauds, and the reason for the statute of frauds is, as you know, an antiquity. That statute of frauds for real estate was because of the peculiar affection that the law has always held for real estate, that because it was such a solemn and serious matter, there were seals in effect, the required seals and all that.

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They can't come now and go around the statute of fraud by yelling estoppel. They say they are not saying fraud. If it were fraud, I would be in trouble, but they say unequivocally no fraud, and I don't want to hear any testimony now in this case, or ever, about fraud. I don't want to burden you with the statute of fraud argument, because we come out at the same road. We come out at the same corner.

The statute of frauds and the parole evidence rule come right down and we end up at the same point, the inadmissibility of any parole evidence, of any oral testimony of any alleged misrepresentation, and I am not getting into the facts about what Mr. Pollitt said or what Mr. Crowe says Mr. Pollitt said, and this and that. There is no point in that because it's totally incompetent. It isn't a question of irrelevancy and immateriality; it's a question of legal incompetency. And that is something which you have to determine. That is something which is peculiarly within your province, and that's why I and we all thank you for doing the homework.

Now, there are two other items that were mentioned by Mr. Targoff which shouldn't take very long, because they are of the same variety. They come from the same cloth, and they are manufactured by the same agile

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legal minds, and that is the counterclaim of the defendants.

The promissory note for $300,000. Individual guarantees by two individuals. In writing. Standard forms, almost Blumberg forms. The bank form of promissory note. The bank form of guarantee. Both forms have been passed on by the State Courts, the National Bank of Westchester gets to litigate these forms from time to time. Both signed, both acknowledged, both witnessed, and now, somehow or another, a defense has to be presented to the promissory note.

Well, what defense can there be to the promissory note absent any fraud?

It's interesting to note that the promissory note and the guarantees were executed after the agreement was executed. They are subsequent documents, so their execution and that loan cannot operate in any way to vary a prior legal agreement. First the commitment letter was signed, then the promissory note, then the estoppel. So you cannot tie the two in. They are separate cases.

If I were in the State court I would have brought summary judgment on the note and the guarantee and obviated that part of it in the trial, but because I am in this court, in my judgment, because of the rule in the federal court about setoffs and motions for summary judgment, and

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because of my own personal experience with summary judgment in this court -- I have gotten summary judgment in this court and gone upstairs and lost it -- I thought in my own judgment, and it is my responsibility, and I don't duck that, I would wait until I had the trial, and then when the evidence would come in, since in my judgment there is no defense to any of this, I would get a directed verdict at the end of the trial for the notes.

Now, Mr. Targoff's argument for the notes was rather perfunctory. He didn't get into it much, but he did mention it. So I just thought I would mention it so that it is before you. I am not now making that motion; I will wait.

I know also, Judge, that I am in here as an inning of the case. It is not over.

I appreciated your admonition before, and I say to you that, this case aside, although I retain my role as an advocate and I won't give it up, this is a classic instance for the application of both the parole evidence rule and the statute of frauds. What you are doing is sound.

I don't want to belittle Mr. Targoff's arguments or unfairly characterize his equitable estoppel argument. I term it desperate, and perhaps it's an argument I would

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make if I were in his legal position. He is a very fine and able attorney.

I also really don't appreciate it when he anticipates what I am going to say, because I haven't said what he said that I was going to say. I usually say what I want to say.

That's it with me, Judge. I think the indication you have given for us is sound law, it's good law, and I urge it upon you, sir, and I thank you for your attention.

THE COURT: Thank you, gentlemen.

MR. TARGOFF: Just briefly, if I might, your Honor. Less than two minutes.

THE COURT: Certainly.

MR. TARGOFF: Just on the question of whether the issue of estoppel had been raised before, Paragraph 22 --

THE COURT: Sir, I didn't want to mislead you, and maybe I spoke in broad terms.

You mentioned it in your initial papers before me. You didn't develop it. You developed it for the first time in the memorandum that you handed today.

Now, I am not saying that I therefore can't look at it and should not look at it. I have examined it. I am just saying, why didn't you throw that before me a long time ago and demand it: "Look at this, Judge."

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All of a sudden comes this bolt on the very day of the trial. So I want to know, hey, what happened? Why didn't you have faith in this estoppel doctrine? Why did you come in so late? It isn't something that's extraordinary. It's been known to every law student. It's been known to the Courts for a long, long time. It isn't a novel theory. Why did you come in so late with it is all I was trying to say, and you have given me your answer to it.

So forget it. That is of small moment. In fact, of no significance at all. So don't worry about that.

I believe, and always have, as you have heard me talk with the jury, that we should communicate with one another, and as I look around the room I am aware there are these frowns, there are these angry looks at the judge as though the judge should be imperiled because he believes what he believes in, that the law should prevail.

Little people think they are going to stop the judge from pronouncing a principle of law because it affects their side.

Good heavens. I point to the voir dire. If that doesn't show a judge in love with the concept of justice, show me anything that does. I don't care whether it's a doctor, or whether it's some little schmuck down the

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street who never saw the inside of a classroom.

We have nothing to do with personalities. I am concerned with the law. I didn't sit up until 3:00 o'clock this morning just to have someone be angry with me or to scare me or think he is going to scare me.

Let's go on to something else.

I have already made it clear to you that copies of all relevant documents, including counsel's trial memoranda and requests to charge, will be marked as Court's exhibits and made a part of the trial record, and what we are saying to you, I repeat, is not meant to preclude an offer of proof, and I will give you your full opportunity on that score.

As we see it here is what the case seems to add up to.

Plaintiff seeks to admit evidence that on January 15, 1974 the screening committee met to consider the hospital project, that the loan was approved subject to the conditions of the December 26th agreements and the additional condition that plaintiffs secure a takeout.

Plaintiff also seeks to admit evidence that there was no reservation regarding the takeout in the December 26th agreements, and that Mr. Pollitt advised plaintiff that securing a firm takeout could be arranged

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by him.

Finally, plaintiff seeks to admit evidence that Lincoln in fact had the obligation to secure the takeout.

Such evidence is not barred by the parol evidence rule since that rule has no application to a subsequent agreement and, therefore, does not exclude parol evidence of a subsequent modification of a written contract. McIntyre v. Latchford, 171 N.Y.Sup.2d 412; Richardson on Evidence, Section 622, the Prince Edition (1973).

However, such evidence is irrelevant as to the issues of the additional condition since that modification must have been in writing. See New York General Obligations Law, Section 5-1103.

Plaintiff contends it is entitled to a refund of the $180,000 commitment fees since the defendant added a subsequent condition, that is, that plaintiff had to arrange a takeout and thereby breached its contract relating to the loan commitment.

Defendant raises two arguments in support of its right to retain the $180,000:

(a) The money is retainable as liquidated damages for plaintiff's breach of its obligation to secure a takeout;

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(b) The $180,000 is valid consideration and was in fact earned on Decem[illegible]r 26th when the commitment agreements were signed.

We think the additional condition that plaintiffs secure a takeout to be unenforceable. Nonetheless, we think that defendant may retain the $180,000 as earned consideration.

There is little authority on subsequent unilateral modification of a contract. The one case we found on point, Stanish v. Polish Roman Catholic Union, 484 Fed.2d 713 -- that's the 7th Circuit in 1973 -- involved a letter commitment to lend money which was accepted by the borrower. Subsequent to such acceptance, an attempt was made by the lender to vary the conditions of the loan commitment. The Court barred the lender from modifying the contract, saying, "It is elementary that once an offer has been accepted a lender could not withdraw it or vary its terms." That is at Pages 722 to 723.

And an additional argument that defendant Lincoln could not modify the contract is based on New York General Obligations Law, Section 5-1103. Where as here a contract must be in writing and is therefore within the purview of the statute of frauds, any subsequent modification must

also be in writing.

There is no proof here that the modification of the December 26th agreements to add the takeout condition was in writing.

In short, we believe, and we may be in error and it is for you to point out our error, that the additional condition is invalid as a unilateral modification and because it does not comply with the statute of frauds.

Accordingly, the plaintiff did not breach this condition and defendant is not entitled to liquidated damages.

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Nevertheless, we feel that there is a great deal more merit to defendant Lincoln's second argument; that is,that the $180,000 was part consideration for defendant's securing the loan and was earned on December 26 when the agreements were signed and accepted.

Defendant contends that the agreements expressly provide that this sum was non-refundable because it was the consideration paid for the issuance of the commitment.

According to defendant, there was never any question that if any of the conditions to the commitment were not met, the fee would be retained because the fee was earned at the time the commitment was issued. Nothing further had to be done by the defendant in order to entitle it to this sum.

It is clear in New York that a court will not inquire into the adequacy of the consideration the parties provide for in their contractual obligations.

When you talk about Judge Cardozo, for whom all of us bow out of great respect to the memory of one of the greatest jurists that ever lived, see what he had to say in Allegheny College against National Chautauqua County Bank, 246 N. Y. 369, 1927: "The slightest consideration is sufficient to support the most onerous obligation. The inadequacy, has has been well said, is for the parties

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to consider at the time of making the agreement and not for the Court when it is sought to be enforced.

"It is competent for the parties to make whatever contracts they may please so long as there is no fraud or deception or infringement of law. Hence, the fact that the bargain is a hard one will not deprive it of its validity."

That's at page 377 of the Allegheny case.

Let me also add another citation, Mandel against Liebman, 303 N.Y. 88, at page 93.

In the present case there are no allegations of fraud, deception or infringement of the law.

If plaintiff had to pay fees pursuant to "a hard bargain," that was its choice, freely entered into.

The defendant itself had difficult obligations to secure the commitment in the first place and it should not be deprived of its bargained-for consideration.

Before I forget, and it seems obvious, tell me, what is the use of a screening committee if all it can do is adopt the talk, the statements of one of its officers?

Of course not. They start de novo. They say: Look at this. Look at that. Let's add it all up. Can we take a chance here? $6 million. Or is it not their function to say: Wait a minute. This is somewhat dangerous

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for us, LFRECC.

Don't you think we ought to have a take-out or a standby? What's your reaction to that? Are they just yes men, this committee? Can the officers sink a company into bankruptcy by saying it is OK, Buddy, $6 million, you'll get it? Is that how it is done? Or is it not that the screening committee, a group of people obligated to perform a tremendous responsibility must initiate such inquiries as they think essential in order to commit the corporation to an obligation of so sizeable an undertaking?

Now, what's our reaction with regard to the promissory note to the bank?

The plaintiff claims that the contract of December 26, 1973 was a valid contract and defendant's failure to loan the money constituted a breach thereof.

As damages, plaintiff claims it is entitled to a cancellation of the $300,000 promissory note, a return of the $180,000 commitment fee and consequential damages.

With respect to the $300,000 promissory note, plaintiff says it is entitled to cancellation on the theory of equitable estoppel. That theory provides: "An estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury. When this occurs it would be

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inequitable to permit the first to enforce what would have been his rights under other circumstances."

Metropolitan Life Insurance against Childs Company, 230 N. Y. 285 at 292 to 293.

Plaintiff claims that it accepted the loan as an advance upon express representations from Mr. Pollitt that the construction money would be forthcoming.

Evidence of this representation would be inadmissible based upon the parol evidence rule.

The promissory note in question is clear, unambiguous and definite on its face. Parol evidence of prior or contemporaneous statements contradicting the terms of the written instrument is as a matter of law inadmissible.

I refer again to the Leumi case heretofore cited, but let's take a look at the language which we believe to be applicable at this juncture.

"Acceptance of the defendant's version of the transaction could be accomplished only by letting Richter give oral evidence directly contradicting the clear terms of a written agreement."

Here the note, I repeat, is clear and unambiguous. It is signed by the individuals, the corporate plaintiffs, and provides that any waiver or modification is not valid

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unless it is in writing and signed. N.Y. G.O.L. Section 15-301(1) prohibits any oral modification or waiver or supplement to the terms of a promissory note unless in writing and signed by the defendant.

Plaintiff has not offered any such writing, but instead intends to rely on alleged oral representations which even if made would be legally ineffectual.

See Chemical Bank against Wasserman, 37 N.Y. 2nd 249, 1975.

Similarly the individual guarantors have no defense and it would appear that defendant is entitled to a directed verdict on the $300,000 promissory note.

It should be noted, however, that as an evidentiary matter, plaintiff may submit proof on the circumstances surrounding the promissory note which suggested to it that this was an advance on the construction loan. I am not sure of that at all, but I am just putting it out, as I have all of it, for your inspection so that as professionals discussing law to which we are committed, I want to afford you the opportunity to have you point out the wisdom or the lack of opportunity in anything that the Court advances.

We think that oral evidence, to sum it up, on this score, as well, and that is the $300,000 promissory

rg:mg6

note, is inadmissible since it is irrelevant. But we are prepared to hear counsel.

I will take another short recess and give you a chance to collect your thoughts.

I think what we will do is not have the jury sit around here while we are engaged in a worrisome phase of our total operations. It's easy to sit here and call witnesses, that's comparatively easy, really. It means very little except to make the rulings and see that they stick on a sound footing, but I don't want to waste your time and I don't want you to waste judicial time.

I am looking for guidance and I will take it from anybody as long as it guides me and helps me make up my mind. I am desperately trying to do the right thing and as lawyers we have got to put our minds to it and see what should be advanced and what should be conceded. I ask you to abolish tactics. You are talking to the judge on questions of law. I didn't ask you to abolish tactics in going before the jury.

We will then tell the jury, gentlemen, unless you can tell me that I am making a mistake, I will have them in here and tell them not to talk about the matter and that we still have these issues of law to resolve and tell them to come back at two o'clock.

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Mr. Clerk, bring in the jury.

(Jury present)

THE COURT: The Court thanks you, ladies and gentlemen, for your patience and your understanding.

We are still in the throes of legal argument which must be resolved one way or the other for us to proceed.

Counsel have been extremely helpful to the Court to the end that we shall see our way clear to make rulings that will relate to how long the case will ultimately take, what evidence we will receive and what evidence we will not receive. That takes time.

Let's go off the record.

(Pause)

THE COURT: I would suggest that you take a good walk, have a good lunch. I am told by my secretary to make it 2:15 because I have a sentence in a criminal case to dispose of before we resume.

Thank you, ladies and gentlemen. See you at 2:15.

(The jury left the courtroom)

THE COURT: I will give you a recess, gentlemen. Let me know when you are ready to respond to the points I raised.

(Recess)

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THE COURT: Mr. Targoff, you have got the floor.

MR. TARGOFF: Your Honor, I will start from the first point which was that we can't show that the contract was modified by oral proof because we must show it is in writing.

I think there may be a mistake in fact here. We do say that they tried to modify the contract in writing. We have a writing. There are minutes of a committee which tries to modify the contract and on this point -- I am speaking to the $180,000 -- our point is that they cannot, and the Stannish case, I agree with your Honor, is right on point. The lender cannot say: We will lend you the money on the following conditions: A, B, C and you pay them money and if they A, B, C, they get to keep the money if you don't take the loan, but if they do A, B,C, and later they put in a D, the Stannish case says they can't do that.

Now your Honor says we can't prove they put in a D because we don't have a writing for it. I don't agree with that proposition of law, but we do have a writing here. We have a number of writings with respect to that condition.

Now, it seems to me that again I would say that

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if the committee here said we approve it subject to a take-out, if the committee had said we approve it provided you close the contract in five minutes, that would have been a approval.

Clearly, could they keep the $180,000? I think the answer is unanimously no. They can't put a condition in which we can't satisfy. We didn't agree to have another condition.

As you said, there is nothing in the December 26 letter which says "take-out," so they can't put that condition in and then by the failure of us to get it or by the failure of them to get it, again depending on who had to get it, and take advantage of that to keep the $180,000.

We paid the $180,000 for them to do certain things. Let's assume they did all that. Let's assume we breached. Let's assume the committee had said we approve it with no other conditions, and let's assume that the bank approved our architect's plans -- because again if they didn't approve the plans, they were not ready to go forward and they don't have damages, I say -- but let's suppose they approved everything that had to be approved, and we decided we had a better loan some place else, the question is: could they keep the $180,000?

It seems to me-- again, I don't disagree with you --

there is no question that the Court never looks at the adequacy or the amount of consideration, but the Court does ljok at the amount of damages. A person just doesn't keep money, they have to prove damages.

Now they don't pretend to prove $180,000 in damages in this case. They do say that the fee was earned, but that's just a matter of contract law. Did they earn the fee? Do they earn the right to get damages; not did they earn this $180,000. They must prove damages. They can't prove the damages here so they say: We can keep it as liquidated damages as they take the Boston Road case, the Boston Road Shopping Center case, 1961, First Department, 13 Appellate Division, Second 106.

Aside from the fact that this case is a case where they lend -- the borrower is the one who doesn't go through with the loan, our case is one where-- there is going to be no testimony, there has not been a word from Mr. O'Keefe that says the bank was sitting there with the money ready to lend the money and we didn't want to take it. That's the Boston Road case.

Even in that case the Court said: Let's look to see whether this money is liquidated damges, let's see if it is fair and reasonable. They held the money in this case over fifteen months. The Court says: Well, fifteen

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months, it is fair and reasonable, the percentage in the Boston Road case.

Here they never held the money. I mean, if I get a contract for someone, they are going to buy my diamond ring and they give me a million dollars for my diamond ring and I say "It is understood should you fail to go forward with this contract, I get to keep the money," there is no question thera is a contract there. The Court doesn't look at the adequacy of the consideration.

But if I sold my diamond ring the next day for a million dollars to Mr. Smith, I can't keep Mr. Jones' million dollars too. I have suffered no damages. I can stand on my head all day and claim liquidated damages. The Court said it has to be fair and reasonable in terms of what your damages would be or actual damages.

Here the $180,000 is not actual damages. There is no claim by them whatsoever. Is it fair and reasonable? What testimony do we have on that? What testimony do they claim they have? There are no efforts to show any. They didn't hold this money at all.

There is also another rule, it seems to me, why they can't keep that. We are entitled to show testimony that any money paid under a mistaken fact, and I will read a quote if I can: "As a general rule, money paid under

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a mistaken fact, that is, an unconscious ignorance or forgetfulness of a fact may be recovered. This is true where, for example, by reason of such mistake, a debt has been paid twice or the amount paid was in excess of the amount due.

"The reason for the rule is that the payee ought not to retain what in conscience does not belong to him as against the person to whom in conscience it does belong."

Now, assuming now I am wrong in everything I said about the $180,000 so far, it seems to me we are entitled to prove that we were told there was approval; it was a mistaken fact. We believed it as a mistaken fact, we paid the $180,000 under that belief, but I neglected to give your Honor the cite of that quote.

It is in Pasadena Associates v. Connor. It is cited in our brief at 460 Southwest 2d 473. The quote I read appeared on page 480. But I think it is a general principle of law.

So in sum now on this $180,000, it seems to me that first to clarify it we don't claim there was no contract. There was a contract, that commitment letter, subject to conditions.

What we claim is that the thought of it being

rg:mg 13

earned is a question that only relates to whether there has been a breach of a contract.

THE COURT: You have made that very clear. I got your point.

I don't want to cut you off but I have got what you are saying. Now go to something else you want to say.

MR. TARGOFF: OK. I have finished up the last point.

We wanted to put testimony in that we thought we were paying for a commitment without any more conditions and that they were going to lend us the money.

It is undisputable they never lent us the money. They never sat down and said: Here is the money, take it, and we said no.

At worst, we have a question of a mistaken mind.

Now, on the $300,000 I really would be repeating much of the equitable estoppel argument, it seems to me.

THE COURT: By the way, will you suffer an interruption?

MR. TARGOFF: Certainly.

THE COURT: I have re-examined your original memorandum. I repeat, you did not advance the doctrine

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of estoppel with regard to the waiver and that's what I was talking about at the time. That was my Point No. 1, the waiver issue. You never did bring up the subject of estoppel with regard to that. So I wasn't wrong, really. I am not always right, but when I am right, I want to stick to it.

You look at it and you will see that you never did bring up the doctine of estoppel with regard to the waiver point until this morning.

All right, next. Go on.

Mr. Targoff, you did advance it with regard to the very point you are now going to develop, and that is with regard to the $300,000 item.

MR. TARGOFF: OK, your Honor. I see the problem and I apologize.

THE COURT: It is all right.

MR. TARGOFF: You see, I viewed the two, and that's what I started to say, I viewed the two really as the same legal issue. You see, what I am saying is that the easiest proof we have to collect damages on our estoppel theory is with respect to this $300,000.

We were told certain things. We relied on them and we borrowed and spent $300,000. That's the heart of our case in terms of our right to damages. That's where

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I raised that issue. I confess that that's my emphasis, it was the emphasis in the brief, it was the emphasis in the request to charge, because I am aware of the law which Mr. O'Keefe says and the difficulty for a borrower to establish that the failure to lend money causes him damages,so I realize where I can't show it on the basis of what I call equitable estoppel; that's what the heart of my attack was going to.

Now, with respect to this, then, I think probably maybe it is unnecessary to repeat, but I believe that I am entitled to claim that this is the hurt we suffered from this representation. The hurt was we borrowed money. We told the man when we borrowed it, we cannot repay you unless we get the loan. That's the circumstances surrounding it.

I want to put oral proof in on that. I don't want to change the terms. I know the note says what it says, that we have no defense, in essence, to the note. I know what the note says, but it seems to me-- and I don't consider it desperate -- it is our case -- it either states a case if we prove the facts -- it is a question of law whether we are entitled to say those things. It is our opinion that the Imperator Realty case and the other cases, the 7th Day Adventists case and others cited both in

rg:mg 16

our requests to charge and in our memorandum say that we are entitled to get facts in on our theory of equitable estoppel.

The difference I suppose between the $300,000 claim and the claim for other damages relating to the losing of the project is really that with the $300,000 we are using the equitable estoppel in a much more traditional way. We are using it in a defensive way.

There is some case law and in some of the cases we cited it says you can use it affirmatively. Most of the case law, and Mr. O'Keefe apparently teaching on the subject knows it well, is you use it defensively. You can use estoppel as a defense mechanism to say you cannot do that where you have misled me by representation.

Let me just check my notes, your Honor.

THE COURT: Surely.

MR. TARGOFF: Your Honor made a remark about whether it was our contention that the loan screening committee were yes men. That is absolutely not our contention. Our contention is that we -- I said it so much -- we know it was subject to approval, we knew they had a function and they could disapprove or approve. Clearly they could. The question is once we were told affirmatively that they had so functioned--not Mr. Pollitt

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telling us that they are just yes men, but they had functioned-- can we prove that they said that to us?

Now I don't know whether I misheard your Honor in the remarks before the recess, the last recess, but I thought I heard something to the effect that here the bank was ready to loan the money and that we can't claim the modification. I don't know whether it was something in high haste to write the note, but I think I have addressed all the points. It just seems to me that if the bank was ready to lend the money, we would have taken it and then if we wouldn't take it, they are entitled to the $180,000. I mean, that's the way everybody knows about commitment fees. We are all familiar with them.

If you are ready to do it and if the person says no, you get it. That's the Boston Road case. Then you don't get all of it unless it is reasonable, because they must show damages. They can't put it in the contract that-- like the guy who gave me the million dollars --

THE COURT: You made that perfectly clear. You even involved a diamond ring where a millon dollars is concerned. I mean I understand it.

I have never had that opportunity and it is wonderful that there is such a thing possible as a million

dollar diamond ring and I glow just at the thought of it.

All right. Thank you.

Mr. O'Keefe.

MR. O'KEEFE: It seems to me, Judge, that a few things need be said initially, which I thought apparent; perhaps not.

My clients are defendants. My clients are defendants and they seek no affirmative relief. They seek no claim except on a note and on the guarantee.

We therefore, on the contract aspects of the action, have no burden. The burden is with the plaintiffs who claim a breach. Their pointing to us, why didn't you do this and why didn't you do that is irrelevant.

Our obligation is spelled out in the letter of commitment. Whether we were ready or willing or able is not really the question. There is no doubt about that. And if that is evidence that's trying to be established, that will take us down a road that is not going to help very much.

There are no writings that I know about other than the commitment letters which are clear and unambiguous, but have to do with the $180,000. The commitment letter and the letter that covered it, which is also

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signed, agreed to and accepted by the plaintiffs says, and this will shortly be in evidence: "It is understood that in addition to all fees and expenses set forth in said commitment letters, there is due upon your acceptance of those commitments, a non-refundable fee in the sum of $180,000, $20,000 of which we now hold.

"Upon acceptance of these commitments by the borrower, there shall be sent to us, together with your acceptance (signed copies of these commitments) the sum of $160,000."

This is the covering letter that was given with the two commitment letters.

It also reads: "We ask that you read each commitment and if you have any questions regarding them, please do not hesitate to call."

Now, this is the $180,000 item here that's also in the commitments.

The loan screening committee met January 15, 1974.

"Resolved: The Cordova Doctors Hospital loan be approved subject to the qualification shown in the submission and the securing of an unqualified take-out by a financially responsible institution."

I feel safe in representing to you as a member

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of the bar of this Court, that the loan screening committee minutes do not mention the $180,000; that the subject was not before the loan screening committee and for I think a very good, logical and businesslike reason.

As I pointed out, officers of a lending institution have one function, the loan screening committee has another. One of the functions of an officer of this type of lending institution is to generate new business thereby earning commitment fees to keep the business going.

The loan screening committee, as you have indicated, has a function of looking over and seeing if it is within the general overall scheme of the company to enter into such a loan. They cannot rely on the officers because the officers, in their zeal, might be trying to push a deal. This is the voice of reason. These are not employees of the institution, these are independents, and they will be here and they will testify. These are members of the Association of Real Estate Appraisers, the president of a savings bank, another banker, a real estate operator and even -- I am not sure of this, but I think he is a senior officer of a life insurance company who had a great deal of experience in the financing of hospitals in Florida.

rg:mg 21

This is the committee that's looking at this. Now, their function was to safeguard the institution from the possible zeal of its officers and they do that by saying: It looks all right, we will take it, but someone has to give us the permanent financing and it must be financially responsible and acceptable to us. So there is nothing on the $180,000.

The argument which we made to you and the argument that you accepted was that it was an earned consideration.

You mentioned the Allegheny College case. I remember Allegheny College. The cases that precede it, Keuka, the cases that came after it, Dicicio v. Schweitzer. I have a recollection of those things only because in the course of being a teacher I used to give the Cardozo lecture every year and I went through all of his cases. More recently the Boston Road case, which I cite to you in our memorandum, which Mr. Targoff cited to you, which is a First Department case, subsequently affirmed by the Court of Appeals. That citation is also before you. It is 11 N.Y. 2d 832.

I hold the case in my hand and it says, as the Court of Appeals affirms in the per curiam without a real opinion.

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It says: "Nothing in the record indicated that the payment of $22,000 in consideration of the defendants holding of $1,100,000 in readiness over the period specified was unreasonable or oppressive and that nothing in the public policy of New York State prohibited such a payment in the nature of liquidated damages."

Now there will be testimony available to you about the custom, the usage, and the practice in the real estate and mortgage brokering business.

These commitment fees are earned. The record will show and the evidence in this case will be that not only did these borrowers pay us a commitment fee, they paid other banks commitment fees; that they knew and that their attorney knew, because it was he who was the moving force here, that in order to deal with institutions who lend on this magnitude, who spend lots of money investigating, appraising, inspecting properties, who have to take in fifty deals to get two deals, that the only way they can keep this thing moving is by the charging of a commitment fee.

It is truly an earned consideration and that is what you have indicated. I argued to you, although you have not indicated, and I urge it further on you, that even in addition to earned consideration, it is

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proper liquidated damages in the sense it is a reasonable pre-estimation of the damages, one based on reason, not an arbitrary number, a million dollars for a diamond ring.

That isn'waht we are dealing with here. We are talking about sophisticated borrowers dealing with equally sophisticated lenders on a commodity that is known as money. When that commodity moves from borrower to lender it has ever been that it is the borrower who pays for the use of the money. That is the nature of the banking business.

The question then becomes -- the Court of Appeals says to hold $22,000 on a $1,100,000 loan is reasonable; so the next question is, is it reasonable, as liquidated damages, to hold $180,000 of $6 million?

If my arithmetic is right, that's 3%. If my arithmetic in Boston Post Road is 2.2%.

I don't want to get into it because it smacks of tactics, other evidence of the federally approved commitment fees on other loans, where the numbers go from 3% to 6%.

There is an area in there, and these banks, these lending institutions, my clients, are competing, and you know if you have an almost no-risk loan, you will pay less than you will with a high-risk loan.

rq:mg 25

You know that at a large savings bank where they have lots of applications you may have to bend a little, but if you have a savings and loan somewhere out of town looking -- in the market looking for a way to move their money around, you might get a much better deal from them. This is all the nature of the banking business.

You will have testimony on that and I would ask you to withhold a legal determination on the reasonableness or the unreasonableness of the $180,000 vis-a-vis the $6 million as liquidated damages until you hear what is reasonable and what is not reasonable in the industry.

You are doing I think properly in holding that it is an earned consideration as Cardozo pointed out in Allegheny College, in Keuka and in Dicicio v. Schweitzer, the adequacy of the consideration is not an element of consideration.

In the old common law with the beaver hat and the peppercorn and all the rest of it, that was adequate consideration, a promise for a promise,an act for a promise.

The law-- and again there is a reason for rules of law. Rules of law aren't just dropped on us, Judge. The reason is if two grown men come together on equal

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terms and without fraud, the law ought not to inquire into their business reasoning because then that would put the law and lawyers in business, and I didn't go to law school to be in business, and you didn't ascend that bench to be a businessman.

We are talking law and the law is what prohibits you from inquiring as to the adequacy of consideration.

The next point and my last point--

THE COURT: Mr. O'Keefe, I regret this.

In my desire to give both of you the fullest opportunity to reason these points out with me so that I can have the benefit of your guidance and your suggestions--because don't you see, I recognize that my rulings, if I adopt any of what I have indicated, will cut off a great deal of testimony and I may decide the whole case on questions of law, and there is a possibility that there is nothing here for the jury.

Unless you tell me, as you have just suggested, Mr. O'Keefe, that with regard to the $180,000, you feel that there should be testimony on that score with regard to the amount, as to whether it is proper, I may have misinterpreted, but as I understood it, if on its face it looked like a consideration that was adopted by the parties, that's all I have to look to, but you are saying,

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Judge, I want to put in proof with regard to it. Well, if we have to take proof with regard to it, OK, there will be proof with regard to that point, but if I am right on the law and if Judge Cardozo's language means anything, then I should not take any proof.

You think it out.

MR. O'KEEFE: Let me answer you.

THE COURT: Don't answer me right now. It is five minutes now to one.

I told the government weeks ago, and a defendant who is coming on for sentence, which is just as perilous and just as fraught with unhappiness as you have sounded on occasion, or Mr. Targoff, and each one has his right to the judge's attention.

So if you don't mind, will you help me by reserving the balance of your argument until 2:15.

MR. O'KEEFE: I will be very happy to defer, your Honor.

THE COURT: You all go to lunch as long as it doesn't interfere with your mental agility. I want you to pick it up and give me the benefit of your reactions and thank you very much for all you have done.

(Luncheon recess)

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AFTERNOON SESSION

2:15 p.m.

(In open court, jury present)

THE COURT: I don't remember in all the years that I have been functioning as a judge having to part company with a jury even on a temporary basis, but I am not going to have you hang around here when you all have different things to do,and we can't use you today because the attorneys have arguments yet to advance and I haven't finally resolved some of these points, so go on home and come back tomorrow at one o'clock.

I hope by that time to know which way we are going. I hope we can go forward, if at all, by that hour, so you are excused.

Have a nice afternoon and good evening and be back here at one o'clock tomorrow.

(The jury left the courtroom)

THE COURT: Mr. O'Keefe, please proceed. Take your time and complete what you wanted to say at the time you were on your feet and if you want to add anything more, go ahead.

MR. O'KEEFE: Your Honor, just to reply to your question which I started before we deferred for your consideration of the other case, it doesn't seem to me

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that a trial is required on that issue of reasonableness since your Honor has indicated, and I think soundly, that the consideration is earned; that the Court ought not inquire as to the adequacy of the consideration.

If, as your Honor has indicated, that will be your Honor's ruling, that disposes of that issue in a legal way.

A further ruling of your Honor on whether or not the liquidated damages would be reasonable or unreasonable would amount to dicta, in my opinion, having ruled on it. You are, of course, at perfect liberty to spread dicta wherever you want, so I don't think any trial would be required.

On the point of the $180,000, that leads me to the last point, and indeed the last point raised by Mr. Targoff and by your Honor, and that is the $300,000 note and the personal guarantees of the defendant.

I will not repeat the arguments of the parol evidence rule which apply to the note. I do not repeat the argument on the statute of frauds which apply to the note.

However, in the memorandum which we have given to you we do point out, as you pointed out in your preliminary rulings, that this is all covered by statute.

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It is the general obligation law again, 15-301, which specifically prohibits any oral modification of the terms of the note and the note itself specifically provides that "no waiver whatever or modification of the terms hereof shall be valid unless in writing signed by the bank and then only to the extent therein set forth."

So the plaintiffs have no other writing with respect to the note. The note, in our parlance as lawyers, speaks for itself, is clear, unambiguous, and is in truth and in fact and in law, if your Honor please, the garden variety bank promissory note which you have seen many times and which has been before many courts and has been the subject of summary judgment from the time it was written.

The last point, of course, is the guarantee. Now, the form of the gurantee, I represent to you, is the usual bank form. The guarantors raise no issue, according to Mr. Targoff, their attorney, of fraud or any other defense to the execution of guarantee. There is no ground for rescission on same because that just hasn't been raised. Therefore, the gurantee occupies the same legal status as the note. It speaks for itself. It is very clear, and it shows, and it reflects the intent of the parties that there be personal liability on the part

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of these borrowers for the money.

Mr. Targoff says that he would like to show that instead of a commercial note with individual guarantors as the papers and documents clearly show that it is, it really represented some other phases of a construction loan.

Now, the glaring inaccuracy of all that is that the note makes no reference to a construction agreement, the guarantee makes no reference to a construction agreement, On something in the magnitude of $300,000 or $6 million you would expect documents to tie together. They do not tie together. They are in terms of time contemporaneous in that they are done in the same time period. Other than that, there is no connection.

The National Bank of Westchester, which I represent, is not in the business of making construction loans. We do make real estate loans. The National Bank of Westchester makes commercial loans. This was a commercial loan. There is no question but that the borrowers were introduced in a non-legal sense, in a business sense, were introduced to the bank by LFRECC. That is true. That was their introduction.

When the transaction was made, I assume, and I think the evidence will show, that the officers of the

bank, a separate and distinct entity from the officers of Lincoln First, based the consideration of the loan, as they must under banking law, by the financials that they had before them.

They studied the financials the doctors had with them, and Mr. Crowe, their attorney, had with them financial information based upon which a banking officer made a determination that there would be a loan, and that there was a good likelihood that the loan would be repaid, and inorder to insure that, the bank, very obviously, required the personal guarantee of the borrowers rather than a corporate note.

This I think is straightforward banking and testimony that it was a prepayment of some type of a construction loan that never happened varies the clear, unambiguous terms of the note and the guarantee.

So all in all, based on what you have before you, both the defendants' case on the note and the case of the guarantee are truly summary judgment cases, but because I am in this court, I wanted to wait until there was some type of a record in order to make that motion, and I am not yet making that motion, but I do in ending, and best thanking you, remind you that there is a motion upon which you reserved which encompasses all of the

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elements that I have been speaking about because all of those elements that we have talked about this morning were contained in Mr. Targoff's opening statement.

I still press that motion upon you, I urge it upon you and I respect whatever you do with that.

Thank you very much, Judge.

MR. TARGOFF: Very briefly, may I?

THE COURT: Surely.

MR. TARGOFF: Again I think there is a bit of a failure of communication either between myself and the Court or myself and counsel.

We do not say and we have never said that the $300,000 was in fact a first draw-down or advance on a construction loan. What I said the testimony would be was that our people asked for a first draw-down to Mr. Pollitt. Computations were made with respect to that.

Mr. Pollitt said he cannot give a first draw-down. He said he might be able to get a loan for you from the bank. They went to the bank. They said in essence: Don't give us the loan of the $300,000 unless we are going to get the construction mortgage because we can't pay you back.

There is no question that they are not trying to change the terms. The terms say nothing about a

rq:mq 34

construction mortgage.

To get back to my point, it is my contention that the law does permit people to prove estoppel through factual testimony, that the parol evidence rule doesnot prevent that and I would add, your Honor, and this one I confess is something I thought of between this morning and right now -- it seems tome that if your Honor is correct about everything you said, their contract fails for a mutuality of obligation.

If your Honor is correct, you have said that the bank can put in a commitment letter, when we pay the $180,000, a condition in there that says it is subject to approval of the loan screening committee, and that approval can be given in any way, shape or form or not given. It can be conditioned in any way, shape or form.

If that is true -- I don't think it is -- but if that is true, and I understand that to be part of the sustaining basis for your decision, what you have said your thoughts are at this point, it would appear to me that the contract of December 26 lacks mutuality of obligation. Not mutuality of consideration, but mutuality of obligation.

I wish I could be more prolific on this subject

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or perhaps more expansive on it. I confess this did occur to me almost like your bolt of lightning you spoke of this morning. I have not examined the subject. I was not prepared to address it, but it occurred to me as something which I should bring up because I think there is something wrong in our not being able to get this proof in and what's happened here in terms of the law, I think there must be something that would sustain me and I am hoping that that might be one other point made this morning in terms of is it sufficient for a Court to hold that the receipt of the $180,000 represented the earning, that they have earned it as a matter of law.

It just seems to that the case, again which we originally rely on, which talks about 1-1/2 or 2%, Boston Road Shopping Center, talks about 2% --

MR. O'KEEFE: 2.2.

MR. TARGOFF: 2.2%. The difference between that 2.2% and this 3% is that in this case, the Boston Road case, talked about 2.2% for fifteen months. It said that $22,000 would be equivalent to 2.2% had the $1 million plus loan been held for fifteen months.

Here we are talking about $180,000. For how long did they hold the money? Even assuming they had the money on December 26 and they let it go on January 15; 20 days?

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$180,000 in 20 days on a $6 million loan. I can't even figure out the percentage of interest that is but I don't think that could be reasonable.

I believe my counsel suggests more that we claim the word "approval" is subject to, under the context of this case --

THE COURT: You better listen to her. She looks sharp to me.

MR. TARGOFF: I will try it again.

The point is, in point 2 of the brief we submitted this morning, we claim we are entitled to submit oral testimony-- oral and written testimony on the meaning of the word "approval." That is, that approval did not necessarily require a formal meeting to approve it, but that it could be approved orally; that that was what was contemplated by the parties.

It is a different issue than estoppel, it is a construction issue.

To close the full circle, the last point raised by Mr. O'Keefe was that there can be no defense to the guarantee; that there was no defense asserted to it. Well, clearly there is a defense of servitude and the question is whether the Court is prepared or willing to let that defense come forward to test it as a matter of

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fact.

The defense is that they are equitably estopped from acting under the circumstances.

THE COURT: Thank you, counselor.

MR. O'KEEFE: Your Honor, I have one or two points, if I may, in response.

First of all, I am perhaps old fashioned enough to believe in pleadings and to believe in federal court pretrial orders.

Paragraph 15 of the complaint in this action and Paragraph 1BB on page 11 of the pretrial order reads as follows-- these are the plaintiffs' contentions and this is what I have to deal with:

"On or about December 27, 1973, Crowe and Stalnaker requested Pollitt and Bergen, acting on behalf of LFRECC, to approve an initial payment to G & S of $300,000 as a first advance of the $6 million proposed to be loaned to G & S pursuant to the construction loan commitment.

"LFRECC, acting through Pollitt and Bergen, thereupon did approve the $300,000 advance against the loan described in the construction loan commitment and directed Crowe and Stalnaker to proceed with Muhlfeld to the offices of the lending institution which would make the requested

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advance."

This is what the complaint says, this is what the pretrial order says, these are the issues to be tried.

Now I find that it is not so, that it is not an advance under the construction loan; it is something else.

I don't understand these things. I don't want to be sticky about anything, but if I am not dealing with pleadings, then I don't know how to operate.

You will have to tell me how to do it because I don't know how to do it unless I am dealing with pleadings and pretrial orders. Otherwise, I am helpless. I don't know where I am.

If someone takes me off the legal track -- it is a good thing I went to law school because there is nothing else that I can do.

Now, mutuality of the contract. I remember the phrase. If both parties are not bound, neither are bound. This is the rule that I remember from contracts. The bank is bound. LFRECC is bound. Our contract contains conditions precedent which bind us. It is the obligation of the bank to comply with the terms of the commitment upon the satisfaction of the condition precedent.

This is how lawyers read these things. This is

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how I read this. We are bound. They are bound and we are bound.

They can't say that we are not bound because they have to satisfy conditions precedent. Conditions precedent are part of the contract which bind us. The mutuality is there.

There has never been, to my knowledge, and I am not a great and never was really agreat student of law and even in the academic world I was never known as a scholar - I wish I were - but there has never been a doctrine in law of mutuality of obligation by degrees. We don't have to be equally bound, as long as we are bound. There is no rule of mutuality of remedy, there is no rule of mutuality of obligation.

The rule is that both parties must be bound to an agreement which is simply a longer way of saying that there must be an agreement.

Once you rule, as a matter of law, that there is an agreement, we are bound, and you don't have to go through all the rest of this.

Now I think that's really all I have to say.

THE COURT: If there is something more you will have an opportunity, both of you.

MR. O'KEEFE: Yes, sir. Thank you.

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THE COURT: In the meantime I am going to do what I do with lawyers that I like and respect. I am going to take you into chambers and we will take down our back hair and talk very plainly so that you can protect your respective clients' interests.

We have a right to disagree, that's happening all the time. As long as we do it genuinely and with conviction, I can see no harm in sitting down and talking to you about how best to preserve the record on appeal and to protect your respective clients fully.

There are no tactics that I am interested in. I think tact is a word for lack of courage. People don't speak up and they call it tact. They are cowards. That's the reason they don't speak up. So tact doesn't enter into my operations at all. I believe that counsel are doing their level best and esteemed lawyers do that, and because I feel that way, I am going to sit down and talk to you informally and you are invited. If you don't want to come, all you have got to do is say: Thank you, Judge.

Would you like to come?

MR. O'KEEFE: Yes, sir, I would.

THE COURT: Would you like to come?

MR. TARGOFF: Yes, sir.

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THE COURT: Come on in.

I think your clients should remain here in case you need them. I would suggest that.

(Recess)

(In the robing room)

THE COURT: Let the record show that since we left the courtroom until now, and it is now 4:15, I have been conferring with counsel on both sides as to the advisability of going about making a complete record satisfactory to counsel in the event of an appeal. In other words, what documents should be marked into evidence, my anxiety being to both sides in the event an appeal is taken from the Court's determination.

Of course, I kept emphasizing that I had not resolved each issue, I had merely indicated the way the Court was inclined to go and I emphasized that I still was going to examine some of the points that were advanced during the course of oral argument.

We even went into the subject of what to do with the jury if the amount of study required made it impossible to proceed before the jury tomorrow.

I pointed out that I was ready to have the jury come back the next day if that became essential or if

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in my own study of the points advanced required more time. In other words, that there was a strong indication that I would take the case from the jury, but in the event that I decide that some issues had to be resolved by the jury, the jury would be called into action.

I must emphasize that as I turned to each lawyer, to be specific, to Mr. O'Keefe and to Mr. Targoff, I asked the simple question:

Do you think that I should take the testimony on an issue that I resolved to be solely a question of law which should be decided by the judge and thus avoid the taking of testimony, and both attorneys unequivocally stated that they saw no sense whatever in adducing testimony with regard to any point that I felt was an issue of law exclusively and that regardless of testimony, I would have to rule according to the law on that particular point.

For instance, with regard to the waiver, and by that, I mean the waiver of the approval by the screening committee.

They agreed that if I have resolved that all the parol testimony in the world would not change or satisfy, rather, the mandate of the law, which is that you can't vary the terms of the contract by anything short of a

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writing, they both agreed that there was no sense in taking any testimony if I felt committed to that proposition of law, and that would be the testimony with respect to every one of the points that I raised, and that they would feel the same way about it, to wit, the needlessness of adducing testimony.

(Adjourned to 10:00 a.m., April 7, 1976)

J.Ben Cooper rq:mq 44

G & S DEVELOPMENT CORP.,
FRANK J. GRESKOVICK,
BENJAMIN L. STALNAKER,

v. 74 Civil 2451

LINCOLN FIRST REAL ESTATE CREDIT CORP., NATIONAL BANK OF WESTCHESTER

April 7, 1976
12:00 Noon

(Trial resumed)

(In chambers)

THE COURT: Since the jury left us yesterday I had counsel in the robing room yesterday and talked about the best way to wind up the case if the Court should decide on these major issues that the need for a jury is not present.

For instance, the waiver factor in the case, and that is the one dealing with the screening committee.

Counsel on both sides agreed that if the judge took a position with regard to these vital factors in the case, such as the one I have just mentioned, and if the position there was that you couldn't introduce parol testimony no matter how effective it might be, it would have to be stricken if it were adduced on the record since

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therewould have to be a writing which was the equivalent of a waiver of the conditions of the written letters of December 26, 1973.

Counsel were helpful in every respect and came forward with what I expected them to say, and that is that there is no need to take any testimony, if that's the judge's position.

I turned to Mr. Targoff and asked him what he would like to say with respect to the offer of proof and in straightforward fashion he said that his opening remarks would be the answer to that question, but he did say he would like to give it further thought and if by tomorrow there were additional points on that score, he would like permission to add them, and I said certainly, provided that they were acceptable insofar as the record so far adduced warrants.

In essence, what I was endeavoring to have clearly enunciated was this, that if the Court decided adversely to the plaintiffs on these major issues-- and what I mean by "major" so we are mighty sure we know what we are talking about, I am going to repeat them:

1. The waiver.

2. The $180,000 feature of the case.

3. The promissory note to the bank, $300,000,

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and the guarantees thereon, and

4. The take-out.

These are the four segments of the case and that if I resolved adversely with respect to any or all of those segments, both sides agreed there was no need to take any oral testimony.

Now, I turn to Mr. Targoff.

You said you wanted to think about additional offers of proof and I afford you that opportunity now.

MR. TARGOFF: Yes, Judge.

As I indicated yesterday, with respect to the representations that I have made as to the testimony I expected both in the opening statement to the jury and in connection with the oral argument before your Honor yesterday, I have, I believe, covered most of them, but because I do not have a transcript, and to be certain, there are some that I will mention now. If they are duplicative, I am sorry, but this is just to preserve the record.

With respect to the issue of what was said by Mr. Pollitt to Mr. Crowe and Dr. Stalnaker --

THE COURT: What segment?

MR.TARGOFF: On the segment of waiver or estoppel, whatever it may be called, I indicated, of

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course, that he said it had been approved before they signed the document.

I want the record clear that there will be testimony that he said that after they signed the document--

THE COURT: You never said that before. I want the record to show that and I want you to answer it, too.

All right, what else?

MR. TARGOFF: I want to make sure that I am saying that that was an intentional representation known to be false, relied upon by my parties to their detriment.

THE COURT: You yourself said there was no accusation of falsity.

MR. TARGOFF: No accusation of fraud, not falsity. I said he said it had been approved. I believe the record will show it was not approved. He knew it was not approved and therefore he knew it to be false.

THE COURT: Now, will you hold that? Are you through with that one point?

MR. TARGOFF: Yes, your Honor.

THE COURT: I don't want to have it all over. I am going to turn to Mr. O'Keefe.

What do you want to say?

MR. O'KEEFE: Yesterday there was a representation made by counsel on the record that the issue of

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fraud was not involved in this case. The elements he has just spelled out are fraud. Intentional knowing representation. Reliance and damages are the classical elements of the tort of fraud and I object to his trying to introduce that into this case at this time when the record binds him not to discuss, introduce or make reference to fraud.

MR. TARGOFF: All I can say, Judge, is that I don't call it fraud--

THE COURT: Wait a minute. Are you through?

MR. O'KEEFE: Yes.

THE COURT: All right.

MR. TARGOFF: The testimony I intend to introduce -- if I would be permitted to put that testimony in, it would be to preclude them from recovering the $300,000, to preclude them from keeping the $180,000 and to establish my case for damages.

I don't give it a label of fraud. The law calls it what it will. I call it estoppel.

THE COURT: All right, what was the next point?

MR. TARGOFF: The next point is with respect to the $180,000 fee which was paid at the signing of the December 26 letters; I say that I want the testimony in that it was understood by both Mr. Pollitt and Mr. Crowe

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that that money would be refunded in total if the bank did not wish to go forward with the loan given the conditions that the bank had to itself satisfy.

I want further testimony that it is custom in the industry that such money is not kept by the bank unless the bank is ready to lend the money and the customer doesn't wish to borrow the money.

I want to further have testimony that this bank itself has made it a policy to return the money except in instances where the customer absolutely refuses to lend the money when the bank-- absolutely refuses to borrow the money when the bank is ready to go forward as a lender.

I want to have testimony that thereafter, the beginning of 1974, Mr. Pollitt indicated that he would return the money if it was used to pay the $180,000 -- excuse me, used to pay the note, that he did return in essence $50,000 of that money and that that is an admission by Mr.Pollitt that the money could be used for that purpose -- it is an estoppel for Mr. Pollitt to claim the money at this time or the bank to claim the money at this time or LFRECC to claim the money is theirs at this time; it acts as a waiver of their right to claim that money in addition.

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I have that through oral testimony and through the letter testimony.

THE COURT: Are you through now with that $180,000 item?

MR. TARGOFF: One minute.

Yes.

THE COURT: All right. Now, what is your answer, Mr. O'Keefe?

MR. O'KEEFE: Just a minute, Judge.

As to the first three items--

THE COURT: You better name them so we know what you are talking about.

MR. O'KEEFE: The first three items Mr. Targoff was just talking about, to wit, conversations between Pollitt and Crowe at and after the loan, the policy of the bank on refunding --

THE COURT: Commitment money.

MR. O'KEEFE: Commitment money, the custom and usage of the bank and the LFRECC's own business custom of refunding money.

I consider practically all of those items which have just been raised to have also been raised yesterday and what has just been said is repetitive of what was on the record yesterday.

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I think the record is also clear that the bank and LFRECC offers to prove exactly to the contrary, but my point yesterday was and remains that if such testimony were admitted, your Honor would either have to disregard it or strike it or rule as a matter of law in the first instance that it was inadmissible.

THE COURT: Now you are arguing the law.

MR. O'KEEFE: That's right.

THE COURT: All I want to know is about the offer of proof.

MR. O'KEEFE: I accept that offer of proof, sir.

THE COURT: All right, now what else is there?

MR. TARGOFF: That in connection with the borrowing of the $300,000, and I do again think this is duplicative--

THE COURT: Go ahead. When a lawyer feels that he would feel more assured that he has done his full duty by emphasizing something, I am not going to cut him off.

Now go ahead. You can re-emphasize it if you wish. Now, what is the additional item of proof?

MR. TARGOFF: That at the time that the $300,000 was borrowed, that is, borrowed upon the representation by Dr. Stalnaker, acquiesced in silence by Mr. Kuhn, that

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the money would not be demanded or repaid until and if the construction loan went forward, that the testimony would be that he said, "Do not lend me the money unless the loan has been approved" and that the loan officer-- the loan officer acquiesced in that statement, and I claim that also is an estoppel or waiver.

I also believe I have covered it, and I know I have claimed that there -- yes, I have covered the rest of it on that.

THE COURT: What do you want to say on that?

MR. O'KEEFE: The last item is repetitive of what the record already shows.

THE COURT: What else? Is that it?

MR. TARGOFF: That's it, your Honor.

THE COURT: I would be less than truthful if I didn't say without impugning the good purposes of Mr. Targoff that there were recited just now factors that were never touched on in our extensive off-the-record conferences or in open court. Be that as it may, it is now on the record and we will go to the next step, and that is the introduction and the marking of papers which I emphasized yesterday, and that is all the writings that would have found their way into the record as a matter of law so that the trial record will be complete.

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It is taken for granted that all the pleadings, the pretrial order are a part of this trial record, and now I am ready to receive, as I indicated, not only indicated, but I said it emphatically yesterday, counsel should be prepared to have marked in evidence any additional writings.

Please note that I said over and over again that the trial memoranda, the requests to charge on both sides, will be exhibits and made a part of the trial record.

Now off the record.

(Discussion off the record)

THE COURT: In the off-the-record discussion in the last two or three minutes, I emphasized that I want counsel, when they answered "ready for trial," they should be prepared to know what documents they are going to offer into evidence and I want to give them, counsel, a chance to talk to one another so that they can say: This we have no opposition to, that we have no opposition to, or this one we object to, and so forth. So iron that all out. It is now 12:30. The jury will be here at 1:00.

I intend to tell them to come back a little later in the event anything should happen that should warrant it, just the way I have the alternates. After a case is all in and the case goes to the jury, I send the

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alternates to lunch; the alternates know, because somebody may get a bellyache and won't be able to function, and I want those alternates available, so it is an extra precaution.

I am going to keep the jury and have them come back a little later in the afternoon in the event that something should happen that should warrant it.

I see no need why the jury, who receives their day's pay for the day, shouldn't be available in the event it becomes necessary. I can't see why that should come to pass but I want them around.

So at one o'clock I intend to tell them to come back at three. By that time you should be all through. I expect to say to them at three "Thank you, that's the end of it." Understood?

MR. O'KEEFE: Yes, sir.

MR. TARGOFF: Yes, sir.

(Recess)

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AFTERNOON SESSION

1:00 p.m.

(In open court, jury present)

THE COURT: Is everybody well?

I have had extended conferences with counsel. I have had the benefit of their help. There are a good number of legal questions that the case presents, and as I have already indicated to you, the resolution of some or all of those points will determine just what evidence is to be adduced.

You have already gotten the inclination, I am sure, that I might rule on some points that I might not receive any evidence on such points. At any rate, we spent hours, and that's the way it should be.

As I have already told you, the case is made up of not only facts, but the law . The better part of wisdom would indicate that I should hold on to the jury until all these issues have been definitely resolved, issues of law, and therefore, you are still in the case as jurors and you will go to lunch and return at 3:30.

By that time we will have resolved all the issues of law that are before me. It saves you time, it saves us time, and counsel are just as much solicitous about you as I am. Take full advantage of the weather.

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Have a good lunch and come back. I am not going to let you go and they are not going to let you do. We are going to hold on to you as long as we can.

(The jury left the courtroom)

THE COURT: Won't you take your seats?

Are we prepared now with regard to the documents?

MR. O'KEEFE: We think so.

May I approach the clerk, your Honor?

THE COURT: Surely.

MR. O'KEEFE: Your Honor, we have agreed to mark certain documents and they will be marked Plaintiff's Exhibits, if your Honor please.

We have also agreed to stipulate on the record, and I offer the stipulation for your Honor's approval, that the record on appeal may include such other additional exhibits which may not be marked this morning, but which are included in our pretrial order, and the supplements thereto heretofore served by counsel and by stipulation of counsel, they may be appended to the record so that the Court of Appeals may have the benefit of all of the documents in this case without belaboring your time in the marking of those type of documents.

THE COURT: But with the distinct understanding that there is now going to be a recital of all the

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documents without enumerating each one.

In other words, when you say all the documents in the pretrial order and the supplemental pretrial order, you mean every document recited therein which obviates the necessity of marking each one of them into evidence? Is that what you are saying?

MR. O'KEEFE: Yes, your Honor. I am saying that and I have a further suggestion, if your Honor please, and that is I think you indicated we would mark the pretrial order itself.

THE COURT: Don't worry about that. I just want to clearly understand what you are saying and I want the record to clearly show exactly what is encompassed with respect to the documents that are to be made a part of the trial record, whether they are marked right now with a definite designation or not. I want them identified, that's all.

MR. O'KEEFE: Yes, sir.

I will try now to start with the specific identification of the exhibits and I therefore hand the clerk for marking a copy of a promissory note dated December 31, 1973, in the amount of $300,000, signed by G & S Development Company, Richard H, Crowe, Jr., B.L. Stalnaker, M.D., Vice President, 253 Broadway, New York, New York 10007;

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G & S Development Corporation, 253 Broadway, New York, New York 10007.

THE COURT: You give him that and he will mark it in due time.

What is the next one?

(Plaintiff's Exhibit 1 received in evidence)

MR. O'KEEFE: The next one is the guarantee of B. L. Stalnaker, M.D., acknowledgedon the 27th day of December, 1973, Plaintiff's 2.

(Plaintiff's Exhibit 2 received in evidence)

MR. O'KEEFE: Guarantee, Frank J. Greskovick by Richard H. Crowe, Jr., pursuant to a power of attorney dated 1/6/73, copy attached. This document is dated December 27, 1973 and so acknowledged. Exhibit 3.

(Plaintiff's Exhibit 3 received in evidence)

MR. O'KEEFE: A letter dated April 19, 1974 to G & S Development Corporation with copies to Stalnaker, Greskovick and Pollitt from the National Bank of Westchester, return receipt requested and receipt attached. That is Exhibit 4.

(Plaintiff's Exhibit 4 received in evidence)

MR. O'KEEFE: A letter dated December 3, 1973 to G & S Development Corporation from LFRECC, signed by R. W. Pollitt, Jr. That is 5.

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(Plaintiff's Exhibit 5 received in evidence)

MR. O'KEEFE: A letter dated December 26, 1973 from Lincoln First Real Estate Credit Corporation to G & S Development Corporation, signed by J. Brian Bergen, Vice President, R. W. Pollitt, Jr., Senior Vice President, agreed to and accepted by Richard H. Crowe,Vice President. That is 6.

(Plaintiff's Exhibit 6 received in evidence)

MR. O'KEEFE: A letter dated December 26, 1973 from G & S Development Corporation signed by R. W. Pollitt, Jr., Senior Vice President, J. Brian Bergen, Vice President, agreed to and accepted by Richard H. Crowe, Vice President, dated December 27, 1973. That is Exhibit 7.

(Plaintiff's Exhibit 7 received in evidence)

MR. O'KEEFE: A letter dated December 26, 1973 to G & S Development Corporation, signed by R. W. Pollitt, Jr., Senior Vice President, J. Brian Bergen, Vice Presidnt, agreed to and accepted by Richard H. Crowe, Jr., Dated December 27, 1973, otherwise known as the covering letter.

(Plaintiff's Exhibit 8 received in evidence)

MR. O'KEEFE: A three-page document on the letterhead of Lincoln First Real Estate Credit Corporation, entitled Loan Screening Committee Mortgage Submission, Construction Loan.

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(Plaintiff's Exhibit 9 received in evidence)

MR. O'KEEFE: An eight-page document on the letterhead of Lincoln First Real Estate Credit Corporation, being the minutes of loan screening committee dated January 15, 1974.

xx (Plaintiff's Exhibit 10 received in evidence)

MR. O'KEEFE: Your Honor, those are the specific documents that both counsel desire to be marked as exhibits in this proceeding.

THE COURT: Correct so far, Mr. Targoff?

MR. TARGOFF: Correct.

It is deemed these are marked in evidence in the plaintiff's case and in the defendant's case on the counterclaim.

THE COURT: Is that right, Mr. O'Keefe?

MR. O'KEEFE: That is right. I consent to that.

In addition, we have agreed that the other documents, and they are very numerous, that are contained in the pretrial order of January 12, 1976, entered in this court by Magistrate Goettel, together with plaintiff's supplemental list of proposed exhibits, which is undated but which was served in open court yesterday upon counsel, consisting of eight further items, we have stipulated that any of these documents may be at a later date included

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in a record which may or my not be prepared for the Court of Appeals so that in the event of an appeal in this case, all of our documents will be before that Court.

THE COURT: Sir, that was a little too general. You say may be. You are agreeing, are you not, that the total trial record should include every single exhibit referred to in the pretrial order and the supplemental sheet that you just referred to containing eight items; is that right?

MR. O'KEEFE: That is right.

MR. TARGOFF: Exactly, your Honor.

THE COURT: Very well.

MR. TARGOFF: I do think we should in some way mark the supplemental list because it was served upon counsel, but I do not believe it has been entered in the record. So if we could mark the supplemental list --

THE COURT: Wait a minute. We will mark it, whether it is marked now or any place else. The supplemental list has been identified. You have been standing right there. It consists of eight items, right?

MR. TARGOFF: Yes.

THE COURT: All right, mark it right now if counsel feels better because there are a lot of other items that have yet to be physically marked, isn't that so?

MR. O'KEEFE: No, that is not so. This is all we are going to physically mark at this trial.

THE COURT: All right. You are not going to physically mark at any time the exhibits recited in the pretrial order and the supplemental sheet just being marked?

MR. O'KEEFE: That is so.

THE COURT: You are just going to hand them up to the Court of Appeals when the appeal is taken?

MR. O'KEEFE: Yes, sir, by stipulation.

xx (Plaintiff's Exhibit 11 received in evidence)

THE COURT: Is that agreed to by both sides?

MR. O'KEEFE: It is agreed to by the defendants, your Honor.

MR. TARGOFF: It is agreed to by the plaintiffs, your Honor.

THE COURT: That is the end of that.

Now off the record.

(Discussion off the record)

MR. O'KEEFE: If your Honor please, based on the record in this trial, and the Court file in this court, and all of the pleadings and proceedings had herein, and upon the documents just identified and marked, and upon all of the proceedings recorded and transcribed since

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this case began on trial before your Honor and this jury, the defendants move, first, for a renewal of its motion to dismiss based upon counsel's opening statement, together with a separate motion to dismiss pursuant to the applicable rule of the rules of civil procedure, to dismiss the complaint herein on the ground that it fails to state a claim upon which relief can be granted.

In addition, the defendants move for judgment on the counterclaim contained in the answer of defendants on the promissory note contained as an exhibit to that answer heretofore marked as Plaintiff's Exhibit 1 in this action.

The defendants also move for judgment on the counterclaim on a personal guarantee executed on December 27, 1973 by B. L. Stalnaker, M.D., heretofore marked Exhibit 2 and defendants also move for a judgment on an individual guarantee by Dr. Frank J. Greskovick, heretofore marked as Exhibit 3.

The defendants move for the entry of judgment by this Court upon those items that I have enumerated together with the costs and disbursements of this action, such interest as the law might allow and such other and further relief as seems proper and just to your Honor in the premises.

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THE COURT: Is there any other motion by either side?

MR. TARGOFF: No. Unless it is formally required and I hereby formally request that all statements made by myself to the jury in my opening statement, in the argument yesterday, and in the further argument in chambers this morning be deemed as offers of proof.

I understand counsel has stipulated that such may be so deemed and that I oppose the motions.

THE COURT: But not with the agreement of counsel.

MR. TARGOFF: The agreement of counsel that they may be deemed as offers of proof, I believe.

MR. O'KEEFE: I think counsel misspeaks. What I agreed to was that counsel's statement would be on the record.

THE COURT: Precisely. That's a different thing.

MR. O'KEEFE: Yes.

THE COURT: I want to emphasize that for the first time this morning there was mention by Mr. Targoff of oral evidence dealing with the waiver of the screening committee and that that evidence would also relate to conversations subsequent to the signing of the letters.

That was never contended before and was never advanced in the memoranda which both of you have

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forgotten have to be marked. We will mark it right now. With that understanding, the record will speak for itself.

I asked: Are there any other motions? And the next thing I get is a statement from Mr. Targoff: I make a motion on the oral proof.

You have already put that in the record. It is there.

We do not agree, however, that what you have offered as proof is in accordance with what has been the subject of discussion on and off the record. In certain particulars it is not. In other particulars it is.

What you are asking, what you want the record to show is that you are renewing your position that you should offer oral testimony along the lines that the record reveals you feel belong.

MR. TARGOFF: Precisely. That my statements made would be the evidence I would offer as oral evidence.

THE COURT: Yes. But you said agreed.

MR. TARGOFF: Agreed that those are my statements.

MR. O'KEEFE: That the record is the record.

THE COURT: All right.

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MR. O'KEEFE: May we suspend the motions while we mark this?

THE COURT: I want all the memoranda marked right now, every single one of them. I want now to have the record show what you are offering.

MR. O'KEEFE: I am offering Defendant's trial memorandum --

THE COURT: Consisting of how many pages?

MR. O'KEEFE: Consisting of 60 pages, dated March 29, 1976.

THE COURT: Mark that as a defendant's exhibit.

xx (Defendant's Exhibit A received in evidence)

THE COURT: Next?

MR. O'KEEFE: A trial memorandum submitted by plaintiffs, consisting of 25 pages, which is undated.

THE COURT: All right, that's plaintiff's exhibit.

xx (Plaintiff's Exhibit 12 received in evidence)

THE COURT: Next?

MR. O'KEEFE: Plaintiff's memorandum in support of admissibility of parol evidence concerning executive loan screening committee approval consisting of 11 pages which is undated.

THE COURT: All right. Mark that as a plaintiff's exhibit.

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(Plaintiff's Exhibit 13 received in evidence)

MR. O'KEEFE: I offer Plaintiff's requests to charge consisting of 13 pages, which is undated.

THE COURT: Plaintiff's exhibit.

(Plaintiff's Exhibit 14 received in evidence)

MR. O'KEEFE: I offer Defendant's requests to charge, consisting of three pages, dated March 29, 1976.

THE COURT: Defendant's exhibit.

(Defendant's Exhibit B received in evidence)

THE COURT: Is there anything else?

MR. O'KEEFE: The defendants have nothing further to mark, your Honor.

THE COURT: Anything else, Mr. Targoff?

MR. TARGOFF: Nothing else, your Honor.

MR. O'KEEFE: The defendant renews its motion, your Honor.

THE COURT: We distinctly understand that all that remains now is for the Court to make its rulings on the motions already placed upon the record and we will do so after luncheon. That, as I get it, should complete the record.

Is that understood and is that agreed, Mr. O'Keefe?

MR. O'KEEFE: The defendants understand and so agreed, sir.

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THE COURT: What do you say, Mr. Targoff?

MR. TARGOFF: We have nothing further to add.

THE COURT: In other words, you agree?

MR. TARGOFF: I agree that the motions can be ruled on. I don't agree with the results, obviously.

THE COURT: We are now compiling a trial record. Is there anything further for the trial record?

MR. TARGOFF: I have nothing further to add to the trial record, your Honor.

THE COURT: All right.

Gentlemen, would it be agreeable with you if we take an hour's intermission, so to speak, for luncheon and for further study by the Court in particular, I think, before the rulings are made? Would that be all right?

MR. TARGOFF: Yes, sir.

MR. O'KEEFE: Yes, sir.

THE COURT: All right, may I thank you again. By that, I mean, and I surely will do it again, thank you, Mr. Targoff and Miss Mueller and Mr. O'Keefe and Mr. Redis for your industry and for your anxiety to fulfill your obligations. Where there is no anxiety, there is no genuineness. There is nobody that I have ever known that has done a good job who hasn't been anxious about it. I praise you for that show of anxiety.

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Announce a recess until 2:25.

THE CLERK: The Court stands in recess until 2:25.

All rise, please.

(Luncheon recess)

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7/76

G & S DEVELOPMENT CORP., et al.
v.
LINCOLN FIRST REAL ESTATE
CREDIT CORP., et al.

--

AFTERNOON SESSION

2:55 P.M.

(In open court, jury not present.)

THE COURT: I regret the delay, but I wanted to finish the memorandum that I am about to place upon the record, and when I say the record I mean the transcript of the trial with the consent and participation by both sides in completing the record in accordance with our understanding.

At the outset we are confronted with the appropriate standard, Federal Rules of Civil Procedure, 50(a), which speaks of a motion for a directed verdict "at the close of the evidence offered by an opponent." There is reference in 50(b) to a motion "at the close of all the evidence."

Thus the rule makes no provision in terms for directing a verdict after the opening statements of counsel. The courts have held that they continue to have power to direct a verdict on the opening statement, but that the power should be used only where it appears that no cause of

action exists in plaintiffs' behalf. See Oliver v. Southern Railway Company, 475 Federal 2d 895, District of Columbia Circuit, 1972.

However, in the present case we have much more than mere opening statements. We have the material documents, the trial memoranda, the requests to charge, the pre-trial order and the arguments advanced on the record by both sides. This record consists of a great deal more than counsels' opening arguments.

In sum, in light of our legal rulings on the admissibility of certain evidence offered by plaintiff we believe that defendant presents a compelling case both on plaintiffs' claim and the counterclaim. The weight of the evidence is such that there can be but one conclusion as to the verdict that reasonable men could have reached here. See Simblest v. Maynard, 427 Federal 2d 1, 4 Second Circuit 1970, and that is in favor of defendants.

The first important legal question that must be resolved is whether we will permit evidence regarding an alleged oral representation by Mr. Pollitt that the condition of the loan requiring screening committee approval had been either waived or satisfied. We adhere to our preliminary observations of yesterday and rule that such evidence is inadmissible since it is barred by the

rqh 3

parol evidence rule. Where the parties have reduced their agreement to a writing, the parol evidence rule operates to exclude evidence of any prior oral or written agreement or of any contemporaneous oral agreement offered to contradict, vary, add to or subtract from the terms of the writing. Thomas v. Scutt, 127 New York 133.

I know, gentlemen, that I am repeating some of which I have said on the record, but after all, that was merely at that time an indication of how the court was leaning, with an appeal to counsel to address their efforts to what was a source of concern to the judge. We listened to you and you were helpful in your own way according to your own lights, but nevertheless the time has come now where we have to wrap it all together and clearly, even at the expense of repetition, state what the court's position is.

Here, as we announced yesterday, evidence that Mr. Pollitt stated that the committee approval had been waived or satisfied is clearly inadmissible since the direct effect of admission of such proof would be to contradict, vary and subtract from the terms of the December 26th agreements. The Leumi case to which I referred against Richter, 17 New York 2d 166.

Further, it is clear that where parties enter

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into a binding contract, parol evidence inconsistent with the express condition of the contract is inadmissible. Fadex Foreign Trading Corporation v. Crown Steel Corporation, 70 NYS 2d 892 First Department.

The December 26th letter agreements express the intentions of the parties on this matter. The alleged oral statement would necessarily negate the written condition. Therefore, any testimony regarding it is inadmissible as a matter of law. Meadowbrook National Bank v. BZURA, 20AD 2d 287 First Department.

Moreover, since the December 26th agreements are within the provisions of the New York Statute of Frauds, that is New York General Obligations Law, Section 5-703, and therefore must be in writing, the statute renders invalid and ineffectual an oral agreement changing or modifying the terms of the written agreement. New York General Obligations Law, Sections 5-1103.

We have examined plaintiffs' supplemental memorandum addressed to this issue and have decided that the authorities cited therein do not alter our disposition. In its memo plaintiff raises two arguments. First that Mr. Pollitt's representations are admissible under an estoppel theory; second, assuming arguendo that the parol evidence rule applies, the testimony plaintiff seeks

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to introduce comes within a recognized exception to the rule.

We reject at the outset plaintiffs' second argument. We do not think the term "approval" to be ambiguous, requiring parol evidence to clarify it.

On the first argument plaintiffs principally rely on Imperator Realty Company v. Tull, 228 New York 447. That case is clearly distinquishable from the present case in that there the oral modification of the written contract there involved occurred subsequent to the execution of the written contract and consequently was not barred by the parol evidence rule. The court stated at page 450 "After the execution of the written contract, including one within the statute, the parties may of course reconsider the subject matter thereof and decide to modify or rescind it. The oral agreement found in this case was made after the execution of the written contract."

It is elementary New York law that the parol evidence rule does not bar evidence of subsequent modification of a written contract. McIntyre v. Latchford, 171 NYS 2d 412; Richardson/Evidence, Section 622, the Prince Edition of 1973; Fisch on New York Evidence, Section 45 and at note 48.

Here in contrast, plaintiff seeks to admit evidence

of a contemporaneous oral representation. Such evidence is obviously barred by the standard rule barring parol evidence. Moreover, since we will not permit such oral evidence, plaintiffs' reliance on a theory of estoppel must also fail since one of the elements of estoppel is that a party make a representation upon which another party detrimentally relies. See Triple Cities Construction Company v. Maryland Casualty Company, 4 New York 2d 443.

Since we will not permit introduction of Mr. Pollitt's alleged contemporaneous allegations, it is obvious that plaintiff cannot make out an allegation of estoppel.

The next primary issue we turn to is the question of plaintiffs' obligation to secure a take-out. As we stated yesterday, plaintiff contends it is entitled to a refund of the $180,000 commitment fees since the defendant added a subsequent condition; that is that the plaintiff had to arrange a take-out and thereby breached its contract relating to the loan commitment. Defendant raised two arguments in support of its right to retain the $180,000. A, the money is retainable as liquidated damages for plaintiffs' breach of its obligation to secure a take-out; B, the $180,000 is valid consideration and was in fact earned on December 26th when the commitment agreements were

signed.

Again we adhere to our view expressed yesterday and hold that defendant is entitled to retain the $180,000 as earned consideration. We repeat, as we stated yesterday regarding the liquidated damages aspect of the $180,000 claim, we think the additional term is unenforceable, both as an invalid unilateral modification -- see Stanish v. Polish Roman Catholic Union, 484 Federal 2d 713, the Seventh Circuit in 1973 -- and as violation of the New York Statute of Frauds, see General Obligations Law, Section 5-1103.

However, we feel as strongly as yesterday that the $180,000 was part consideration for the defendants securing the loans and was earned when the agreements were executed. As pointed out to us, the agreements expressly provide that this sum is nonrefundable because it was consideration paid for an issuance of the commitment.

According to defendant there was never any question that if any of the conditions to the commitment were not met, the fee would be retained because the fee was earned at the time the commitment was issued. There is no allegation that the committee action was unreasonable or in bad faith.

It is clear, and it bears repeating, that a court will not inquire into the adequacy of the consideration the

parties provide for their contractual obligations, and that's the Mandel case and the Allegheny College case cited yesterday.

In the present case the pleadings are barren, absolutely barren of any allegations of fraud, misrepresentation, deception or infringement of law on any phase relating to the total claim.

We say further if plaintiff had to pay fees pursuant to a "hard bargain", that was its choice freely entered into. This court will not pierce the contractual veil these parties have raised. The defendant is entitled to retain the $180,000 and we direct a verdict in its favor on that issue.

The third issue is the question of defendants' counterclaim for $300,000 on the promissory note and guarantee. As to this issue the defendant has the burden of proof. To the extent that the party with the burden of proof has established its case by documentary proof or evidence that a jury is not at liberty to disbelieve, a directed verdict is appropriate. See Federal Insurance Company v. Summers 403 Federal 2d 971, 975 to 76, First Circuit, 68; Wright and Miller, Civil Section 2535. We think that this is an appropriate instance for directing a verdict in favor of the complainant because the defendants' evidence

rgh 9

regarding the promissory note is such that a jury is not at liberty to disbelieve it.

The promissory note in question is clear, unambiguous and definite on its face. Parol evidence of prior or contemporaneous statements contradicting the terms of the written instrument is as a matter of law inadmissible. We again refer to Leumi. The court language there is instructive. "Acceptance of the defendant's version of the transaction could be accomplished only by letting Richter give oral evidence directly contradicting the clear terms of a written agreement."

Here the promissory note is exactly that, clear and unambiguous. It is signed by the individual plaintiffs, Greskovick and Stalnaker, as well as the corporate plaintiff, G & S Development. It provides that any waiver or modification is not valid unless it is in writing and signed. Similarly New York GOL, Section 15-301(1) prohibits any oral modification or waiver or supplement to the terms of a promissory note unless in writing and signed by the defendant. The plaintiff has not offered any such writing, but instead intends to rely on alleged oral representations which even if made would be legally ineffectual. See Chemical Bank v. Wasserman, 37 New York 2d 249.

As we see it the individual guarantors, Greskovick ar

Stalnaker, have no defense. Accordingly the defendant is entitled to a directed verdict on the $300,000 promissory note.

To recapitulate, we direct judgment in defendants' behalf on both the plaintiffs' claim and on the defendants' counterclaim. The complaint accordingly is dismissed and judgment is ordered for the defendant on its counterclaim. The defendant will submit an appropriate judgment on notice to the plaintiff.

We will await the jury. They are due here at 3:30. It is now 3:10. I shall thank them and dismiss them at that point. Thank you.

Will you announce a recess.

THE CLERK: The court will take a short recess.

(Recess)

(In open court, jury present.)

THE COURT: Ladies and gentlemen of the jury, on behalf of counsel, as well as myself, we thank you for your indulgence. The case has been disposed of. Judgment will be entered in accordance with the disposition. The case is closed as a result of that and there is no factual issue that we have to submit to you for your consideration.

I would like to take a minute or two because it is my nature to call your attention to something that must

rgh 11 159

be evident, but which we are prone to forget. Number 1, to understand each other and to see the truth and to discard as Americans should the easy hearsay and gossip that prevails so much. You have been told on the radio, television, newspapers the way justice is administered. I don't know of any other way that you can get an idea of what's going on in the courts, but at least you have seen the court at close range. You have seen our deep concern with the doing of justice, you have seen the care in the selection of the jury, you have seen counsel anxious and deeply involved with the respective rights of the claimants, assert their position earnestly, with zeal and with conviction. It is not at all like the picture of indifference and the picture that is so often painted of nobody caring. From your lone observation of one another in the short time that's been available to you, you can see the quality of those who make up the jury and that they, too, are no less involved and deeply concerned with their own obligation. The system is good, it is solid. It should prevail. That there are infirmities is to be expected? Only dreams, pleasant dreams have no infirmities.

In reality, in life one would expect someone to expect that nothing is perfect. No system is. The only thing we can hope for is to reduce those infirmities to a

minimum. That's what I am sure you must have concluded is the endeavor, whether it has been fully accomplished time will tell. But that's the endeavor and that's the purpose with the doing of justice. Thank you for your part and may I also say that the counsel on both sides congratulated themselves along with the judge that we were fortunate in having so splendid a segment of the populous from the community. Thank you for coming and I hope with the passing of time somehow that wheel will work in such a way that some of you, even just one of you, will come back to my court. Thank you. You are dismissed from further consideration in this case.

(Jury excused)

THE COURT: The court is adjourned.

EXHIBIT INDEX

Plaintiff	Identification	In Evidence
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LETTER DATED APRIL 7, 1976 FROM HONORABLE IRVING BEN COOPER
TO MESSRS. MICHAEL B. TARGOFF AND RAYMOND P. O'KEEFE

287A

JUDGE'S CHAMBERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, NEW YORK 10007

IRVING BEN COOPER
SENIOR JUDGE

April 7, 1976

Michael B. Targoff, Esq.
1 Chase Manhattan Plaza
New York, New York 10005

Raymond P. O'Keefe, Esq.
175 Main Street
White Plains, New York 10601

Re: G & S DEVELOPMENT v. LINCOLN FIRST
REAL ESTATE CREDIT - 74 Civ.2451

Gentlemen:

The record will show that we were taken aback when Mr. Targoff this morning injected for the first time that his "offer of proof" would include events subsequent to the writings with which we were concerned. We have reflected further on the significance of the so-called offer of proof and wish the trial record to reflect that we strongly disapprove the tactic. Further, aside from the opening remarks to the jury by Mr. Targoff there was no true offer of proof at any time but merely general comment. For the full meaning of "offer of proof," see Armour & Co. v. Nard, 463 F.2d 8, 12 (8th Cir. 1972); Fortunato v. Ford Motor Co., 464 F.2d 962, 967 (2d Cir. 1972); Wright & Miller, Federal Practice & Procedure: Civil §2414.

We direct the official court reporter to incorporate this entire letter into the record.

Very truly yours,

Irving Ben Cooper

United States District Judge

cc: Official Court Reporter

OFFICE RECORD

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April 9, 1976

Honorable Irving Ben Cooper
United States District Judge
Southern District of New York
United States District Court
Foley Square
New York, New York 10007

Re: G & S Development v. LFRECC
74 Civ. 2451

Dear Judge Cooper:

I am receipt of the Court's letter of April 7, 1976 concerning the above matter. Your Honor's letter contains the refernce that the morning of April 7 was the first time that I stated that plaintiffs intended to prove that they had received the representation that the Loan Screening Committee had approved the loan both before and after they signed the December 26 letter agreements. My recollection is to the contrary.

I believe that I had stated in my opening remarks to the jury that my clients had been told both before they and after they signed the December 26 letter agreements that the Loan Screening Committee had approved the loan. In addition, with respect to the $300,000 personal loan, it is my recollection that I stated in my opening remarks that there would be proof that, after the signing of the December 26 letter agreements, Mr. Pollitt in plaintiffs' presence telephoned NBW and stated that the loan had been approved. We of course do not have the transcript of the proceedings and will only be certain of what was said after the same has been obtained.

However, I do note that on page 7 of our trial memorandum delivered to the Court on March 31, 1976, we state:

> "Plaintiffs expressed concern about obtaining formal approval of the Loan Committe prior to G&S's acceptance of the commitments and both before and after the signing of the agreements, Pollitt assured them that he had obtained the approval of the members ...." (Emphasis added.)

Again, on page 8 of the pre-trial memorandum, we state with respect to NBW's extension of a $300,000 loan:

> "On the express representation from Pollitt that the loan had been approved and the financing for the hospital project would be imminently forthcoming from LFRECC, NBW modified its customary prohibition against loaning to out-of-state individuals who were not customers of the bank ...."

Further, we state on page 15 that

> "The representations made by Pollitt and Muhlfied [another employee of LFRECC] to officials of NBW indicated a course of conduct to plaintiffs constituting a waiver of formal Loan Committee approval."

With respect to the last two cited portions, it is conceded by both parties that plaintiff's contacts with NBW occurred after they signed the December 26 letter agreements.

I also call the Court's attention to paragraph dd contained on page 14 of the pre-trial order. There, plaintiffs state that one of their contentions of fact is that:

> "Plaintiffs, as a direct result of defendants' course of action and of the representations made to Crowe and Stalnaker on or about December 26, 1973 and thereafter to the specific effect that the loan transaction described in the Construction and Permanent Loan Commitments had, but for the execution of customary documentation, been concluded, relying thereon were induced to execute the note in favor of NBW described above. This ntoe was purchased from NBW by LFRECC on or about June 30, 1975." (Emphasis added.)

BEST COPY AVAILABLE

Similarly, it is my recollection that I indicated on the record in argument that it was our position that our theory of equitable estoppel could be established by a course of conduct which the jury could find constituted the equivalent of a representation. The course of conduct, of course, was subsequent to the signing of the December 26 letter agreements. And most importantly included the arranging through NBW of the $300,000 loan to G & S Development Corporation.

With respect to Your Honor's reference in your letter of April 7, 1976 where it is stated that aside from the opening remarks, there was no true offer of proof at any time but merely general comment, I believe it was stated on a number of occasions on the record that what the plaintiffs intended to offer as proof included that which was said by me in the opening to the jury, that which was said by me in my arguments to the Court in connection with the Court's rulings on the evidence matters, and that which was said by me on the record in chambers on the morning of April 7 after the Court gave me explicit leave to supplement what had theretofore been said so that there would be no prejudice to the plaintiffs. Again, exactly what was said will have to be borne out by the record of the proceedings.

Very truly yours,

Michael B. Targoff

MBT:cmv
BY HAND

cc: Raymond O'Keefe, Esq.

LETTER DATED APRIL 20, 1976 FROM
HONORABLE IRVING BEN COOPER TO
MICHAEL B. TARGOFF JUDGE'S CHAMBERS

OFFICE RECORD 291A

4970 - 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, NEW YORK 10007

IRVING BEN COOPER
SENIOR JUDGE

April 20, 1976

Michael B. Targoff, Esq.
Willkie, Farr & Gallagher
One Chase Manhattan Plaza
New York, N.Y. 10005

Re: G & S DEVELOPMENT CORP. v. LINCOLN
FIRST REAL ESTATE CREDIT - 74 Civ. 2451

Dear Mr. Targoff:

We regard it no more than fair and proper to order that your letter of the 9th be made a part of the official court transcript. Nothing therein, however, causes us to change a single word in our letter of the 7th addressed to counsel. Let the record speak for itself.

This note likewise shall be made a part of the official trial record.

Very truly yours,

United States District Judge

cc: Raymond P. O'Keefe, Esq.

Official Court Reporter

JUDGMENT NO. 76-503 AND ORDER FILED MAY 28, 1976 AND ANNEXED EXTRACT OF THE MINUTES OF TRIAL (pp. 292A-294A)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

G & S DEVELOPMENT CORP., FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs,

-against-

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,

Defendants.

----------X

74 Civ 2451 IBC

JUDGMENT
76,503

This action came on for trial before the Court and a jury, Honorable Irving Ben Cooper, Senior United States District Court Judge, presiding, and now upon motion of defendants, the Court having directed a verdict for defendants, it is

ORDERED, ADJUDGED AND DECREED, that said motion be and the same is hereby granted in all respects, and it is further

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same is hereby dismissed with prejudice, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, LINCOLN FIRST REAL ESTATE CREDIT CORP., recover on its counterclaim against the plaintiff, G & S DEVELOPMENT CORP., the sum of $262,258.69 with interest from June 20, 1974 to May 14, 1976 in the sum of $61,423.49 and with interest at the rate of Six (6%) percent as provided by law on the sum

of $323,682.18 from the date of entry of this judgment, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, LINCOLN FIRST REAL ESTATE CREDIT CORP., recover on its counterclaim against the plaintiff, FRANK J. GRESKOVICH, the sum of $262,258.69 with interest from June 20, 1974 to May 14, 1976 in the sum of $61,423.49 and with interest at the rate of Six (6%) percent as provided by law on the sum of $323,682.18 from the date of entry of this judgment, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, LINCOLN FIRST REAL ESTATE CREDIT CORP. recover on its counterclaim against the plaintiff, BENJAMIN L. STALNAKER, the sum of $262,258.69 with interest from June 20, 1974 to May 14, 1976 in the sum of $61,423.49 and with interest at the rate of Six (6%) percent as provided by law on the sum of $323,682.18 from the date of entry of this judgment.

No objection having being noted by plaintiffs to the proposed judgment, the Clerk is directed to enter judgment accordingly.

May 27, 1976
SO ORDERED:

U. S. D. J.

JUDGMENT ENTERED - 6/1/76
Raymond F. Burghardt
CLERK

OFFICE RECORD

294A

At a Slated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the 5 TH day of APRIL in the year of our Lord, One Thousand Nine Hundred and 76.

PRESENT:
HONORABLE: IRVING BEN COOPER
United States District Judge.

G + S. DEVELOPMENT CORP.
FRANK J. GRESKOVICK
BENJAMIN L. STALNAKER
VS.
LINCOLN FIRST REAL ESTATE CREDIT CORP.
NATIONAL BANK of WESTCHESTER

Docket No. 74 Civ. 2451

Now comes the Plaintiff By WILLKIE, FARR + GALLAGHER
By: MICHAEL TARGOFF + PAULA MUELLER
and moves the trial of this cause. Likewise comes the Defendant by M.C. ARTHY.
FINGAR, GAYNOR + DONOVAN, Esqs. By: Raymond P. O'Keefe + Robert M. Redis
Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial.

APR 5 - 1976 Jury trial begun (Panel of six (6) Jurors)
Opening Statements by Counsel
APR 6 - 1976 Trial Continued.
APR 7 - 1976 Trial Continued.
MOTIONS FOR DIRECTED VERDICT
BY DEFENDANTS BOTH ON PLAINTIFF'S CLAIM
AND ON DEFENDANT'S COUNTERCLAIMS
MOTIONS GRANTED. DEFENDANTS TO
SUBMIT AN APPROPRIATE JUDGMENT ON NOTICE.
COOPER, J.

BEST COPY AVAILABLE

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that two (2) true copies of the Appendix have been duly served, by hand, on Raymond P. O'Keefe, McCarthy, Fingar, Brown & Glatthaar, Counsel for the Appellees in the within appeal on the 3rd day of January, 1977.

Dated: January 3, 1977

Paula J. Mueller

Paula J. Mueller